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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE and KATHLEEN FERRARO,

Petitioners,

—v.—

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, ELLA OWENS, CARRIE HOWARD, THELMA LATTA, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RICHARD C. CAHN
Special Counsel, Town of Huntington
CAHN WISHOD & WISHOD
of Counsel
Counsel for Petitioners
534 Broadhollow Road
Melville, N.Y. 11747
(516) 694-2300

February 8, 1983

Questions Presented

1. Do individual black citizens, a civil rights organization, and an organization dedicated to providing publicly subsidized housing for minorities and the poor, possess standing under Article III of the United States Constitution and the Fair Housing Act, 42 U.S.C. §3612 (1976), to challenge a municipality's entire zoning code as allegedly exclusionary where the specific project in which they are interested cannot be built by reason of the unavailability of public financial assistance?

2. Are the claims of civil rights plaintiffs immediate and ripe for determination, and, if so, should their claims be determined in the first instance in a federal court, notwithstanding principles of comity and federalism, where the principal relief sought is that petitioner be ordered to rezone for multi-family use a particular parcel of property, but no application for such relief was ever made to the municipal officials vested by New York law with the authority to grant zoning changes?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, The Town of Huntington, New York, Kenneth C. Butterfield, Kenneth Deegan, Edward Thompson, Joseph Clemente and Kathleen Ferraro pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this action, which were filed on the 28th day of September, 1982.

Opinions Below

The judgment and opinion of the Court of Appeals, reported at 689 F.2d 391 (2d Cir. 1982), appear at Appendix pages 1a to 9a and 26a to 27a. The opinion of the district court (Constantino, J.) reported at 530 F. Supp. 838 (E.D.N.Y. 1982) appears at pages 10a to 25a in the Appendix.

Jurisdiction

The jurisdiction of the district court was based upon 28 U.S.C. §§1331, 1343(3) and (4), 1361, 2202, and 42 U.S.C. §3612 (1976).

The judgment of the Court of Appeals was filed September 28, 1982. A timely petition for rehearing en banc was denied by order filed November 12, 1982, which appears in the Appendix at pages 28a to 29a. This petition for certiorari is filed within ninety (90) days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

Statement of the Case

The United States Court of Appeals for the Second Circuit reinstated, after a district court dismissal under F.R.C.P. 12(b)

and 56 for lack of standing, the first and fourth causes of action of a complaint by the Huntington Branch of the NAACP, Housing Help, Inc., and six individuals, charging the Town of Huntington, New York, and its Supervisor and Town Board members,[1] with "interference" with a proposed housing project in violation of the Fair Housing Act, 42 U.S.C. §§3601-3631 (1976); 42 U.S.C. §§1981, 1982 and 1983 (1976); and the Fourteenth Amendment to the United States Constitution.[2]

Respondent Housing Help assertedly possesses an option to purchase a 14.6-acre parcel of real property located in Huntington, and respondents claim that the petitioners' actions prevented development there of a 162-unit apartment project ("Matinecock Court"), which would have otherwise received federal financial

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[1]Petitioner Butterfield was and is Town Supervisor, and hence occupies an executive position, but pursuant to New York Town Law, §§29 and 52, he also performs legislative functions as a member of the Town Board. Zoning power is vested in the Town Board, New York Town Law §261 (McKinney 1965). After the determination in district court, an original defendant, Claire Kroft, was defeated for reelection and replaced by petitioner Ferraro.

[2]A second cause of action challenged on racial concentration grounds qualified approval by the United States Department of Housing & Urban Development ("HUD") of a pending, and since withdrawn, application by the Town for funds under Section 8 of Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, 42 U.S.C. §1427f (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub. L. No. 97-35 ("Section 8"), for a 150-unit low-income project, to be built by the Town itself within its Urban Renewal Area. A third cause of action challenged HUD's approval of the Town's 1979-82 Housing Assistance Plan ("HAP"), which had been submitted pursuant to 42 U.S.C. §§1437, 1439; 42 U.S.C. §§5304; and 24 C.F.R. §570.306(b)(3)(i), on the ground that the stated goal of zero new construction housing units contributed to and perpetuated racial segregation. The second and third causes of action were dismissed, and no appeal was taken by respondents. The Town withdrew the 150-unit urban renewal project, rendering the second cause of action moot. The third cause of action was dismissed because of the unavailability of Section 8 funds; however, HUD stated that it would require the Town to revise its housing unit goal to 100 if such funds become available, and Judge Costantino granted leave to respondents to reinstate the action against HUD in that event.

assistance under Section 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, 42 U.S.C. §1437f (1976 and Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. No. 97-35 ("Section 8").

The first cause of action alleged that petitioners unlawfully (1) "restrict[ed] private construction of multi-family housing units . . . to the Town's Urban renewal area", (2) "refus[ed] to take any action to afford multi-family housing status to the Matinecock Court site", and (3) "oppos[ed] respondents' application to HUD for Section 8 assistance for Matinecock Court."

The fourth cause of action is a pendent state action.

Analysis of the three federal claims follows:

1. Restriction of Private Construction of Multi-Family Housing Units to the Urban Renewal Area.

The Huntington Zoning Code does, in effect, restrict private construction of multi-family units to the Town's urban renewal area.[8] Despite the fact that the Huntington Housing Authority

[8]The Town of Huntington Housing Authority was created in 1960 by an act of the New York State Legislature (Laws of New York 1960, c.417), and upon its creation, the Town could and did create an urban renewal area, and subsequently applied for federal funds from the Urban Renewal Administration. The Housing Authority is authorized to manage and administer public housing programs under various federal and state laws, including construction and rehabilitation of housing units and family subsidy programs, 42 U.S.C. §1437f (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. 97-35. The Huntington Urban Renewal Agency was created by Laws of New York 1967, c. 222; it was authorized by the State Legislature to carry out the purposes of the State's urban renewal law, Laws of 1961, c. 402, codified at New York General Municipal Law §500-524 (McKinney 1974 & Supp. 1982-1983). In 1977 (Laws of New York 1977, c. 573), the name of the latter agency was changed to the Huntington Community Development Agency and it was authorized to apply for funds under the Housing and Community Development

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is authorized to construct low income housing anywhere in the Town, respondents claim Huntington violated the Fair Housing Act, 42 U.S.C. §§3601-3631 (1976), by reason of its restriction of *privately* constructed multi-family housing. In the courts below, petitioners asserted that there can be no Fair Housing Act violation where a municipality has, as the Town of Huntington has, provided available areas for multi-family housing and acted affirmatively to promote low income housing.[4]

Petitioners argued below that despite respondents' assertedly possessing an option upon real property outside of the urban renewal area, their standing to challenge this policy depended

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Act of 1974, for the construction of new low income housing units and substantial rehabilitation of existing housing units. The Town adopted its first zoning ordinance in 1934. In 1965, the Town's Planning Board, pursuant to state legislative authorization contained in New York Town Law §272-a (McKinney 1965) adopted a comprehensive master plan for the development of the entire area of the Town. New York General Municipal Law §503 (McKinney 1974) requires the Town's Master Plan and Urban Renewal Plan to conform to one another; and Huntington fully complies with this requirement. From 1960 to 1964, there was no provision in the Zoning Code for multiple dwellings. On March 4, 1964, the Town amended its Code and created a Public Housing District, and the land upon which Gateway Gardens, the first public housing in Suffolk County, was shortly to be constructed, was placed in the new zone. The R-3M District, adopted June 3, 1969, provided for multiple dwellings in urban renewal areas, or, if owned by the Housing Authority, within or without such an area; and in 1969 the Public Housing District merged with and became part of the R-3M District. During the period 1950 to 1970, the Town's population grew from 47,506 to 200,172. Over the next decade, however, the population barely changed, the 1980 federal census showing 201,512 persons.

[4]*See Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (on remand). Respondents' allegations that they are injured because the available sites for multi-family housing are assertedly in areas of minority concentration cannot stand in light of Section 216 of the Housing and Community Act of 1980, 42 U.S.C. §1436-b (Supp. IV 1980) where Congress directed HUD "not to exclude a project for funding solely because its site is located in an area of minority concentration." It is evident that the Fair Housing Act was not intended to support this claim.

upon a showing that it constituted a barrier to actual construction on that property of a low income housing project.

The record, however, shows that "none of the plaintiffs have the financial capability to construct the Matinecock Court project without federal financial assistance", and that no such assistance is now, or soon likely to be, available. Far from controverting these facts, respondents affirmatively alleged that,

> "the housing needs of low income and minority citizens seeking decent affordable housing in Huntington, can, for the most part, only be met through the provision of housing units in a multi-family context and with use of state and/or federal subsidy program funding",

and submitted no evidence that federal or state funding would at any time become available for the purpose of constructing Matinecock Court. The HUD affidavits flatly stated that there is no likelihood of any new Section 8 construction funding for the Town of Huntington. HUD Area Manager Weiner stated that all such new construction funding was eliminated for fiscal year 1981 and no proposals would receive funds. HUD also stated, without contradiction, that no Section 8 funds had been made available to the New York area for fiscal 1982.

The Second Circuit appeared to recognize that the question was whether plaintiffs' injuries were "likely to be redressed if the requested relief is granted", 689 F.2d at 394, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979), but interpreted *Gladstone* as requiring merely that the relief sought "be reasonably designed to improve the opportunities of a plaintiff" (*id.*). The Court concluded,

> "In this case, we cannot exclude the possibility of Section 8 monies being available for Matinecock. Section 8 has not been eliminated and the availability of Section 8 monies in subsequent years is thus uncertain. Unlike *City of Hartford*

v. [*Town of Glastonbury*, 561 F.2d 1048 (2d Cir. 1977) (*en banc*), *rev'g.* 561 F.2d 1032 (2d Cir. 1976), *cert. den.*, 434 U.S. 1034 (1978)], therefore, the relief sought here may benefit the plaintiffs." 689 F.2d at 395.

2. Refusal to Take any Action to Afford Multi-Family Housing Status to Matinecock Court.

On February 22, 1980, representatives of respondent Housing Help met casually and informally with four members of the Town Board, but not with Supervisor Butterfield, "to advise Huntington officials of the Matinecock project . . . and to request that the Town Board act to permit multi-family residential zoning for this development" and to permit "multi-family residential construction by private developers outside of the urban renewal area and throughout the Town". (Complaint, ¶42).

In treating the February 22nd meeting, the Second Circuit merely recited respondents' informal zoning request, noted that it had been referred to the Town's Planning Department for study, and that the Town planning board had not yet reported the results of its study. 689 F.2d at 392.

New York Town Law §§264 and 265 (McKinney 1965 & Supp. 1982-1983), however, direct town boards to adopt procedures for rezoning applications, which in Huntington must be in writing accompanied by supporting documentation. (Code of the Town of Huntington, 1978, §198-130).

The record is undisputed that no application for a change of zone for the Matinecock site has even been made.[5]

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[5]Respondents excused their failure to apply for rezoning by stating that the Town Board "cannot grant a multi-family use on the site without first generally amending the Town's zoning ordinance to permit multi-family residential construction by private developers outside of the urban renewal section of Huntington and throughout the Town". To the

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Moreover, New York Town Law §272-a (McKinney 1965) vests the planning board with jurisdiction over changes in a town's comprehensive master plan, which would be required, were the Town to accede to respondents' request to permit private multi-family construction "throughout the Town". Thus, referral of respondents' informal request to the planning board was in accordance with usual procedures. Respondents did not await the completion of the study before filing this action.

The Second Circuit appeared to treat petitioner's failure to promptly schedule a hearing upon the basis of respondents' oral and informal request, and thereafter to grant a rezoning, as tantamount to a denial of a formal application for multiple housing zoning on the option site, entitling respondents to a trial on the question as to whether that denial was racially motivated.

Petitioners argued below that respondents' failure to make formal application for a zoning change (which, carefully and properly documented, could be acted upon through the usual zoning procedures under New York law) rendered the action premature and nonjusticiable, relying in part upon *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980), in which this Court found "no concrete controversy" regarding the application of municipal zoning requirements, because "appellants have not submitted a plan for development of their property" under the ordinance.

Petitioners also argued that it was inappropriate for zoning applications to be determined in the first instance in federal court.

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contrary, respondents have always been free to formally request that multi-family zoning be created for their property and grant of that application would itself effect a change in the Zoning Code and Map. New York Town Law §265 (McKinney 1965 & Supp. 1982-1983). A recent unpublished opinion of the New York Supreme Court, Suffolk County, (*Suffolk Housing Services, et al.* v. *The Town of Brookhaven, et al.*, Index No. 75-20017, made it clear that most communities do not zone vacant land for multi-family purposes independently of specific applications by landowners (*Suffolk Housing Services*, Slip Op. at p. 15).

The district court, having dismissed the action by reason of the unavailability of funds with which to build the project, did not reach these issues. The Court of Appeals did not address the latter issue.

3. Opposing Respondents' Application To HUD For Section 8 Assistance For Matinecock Court.

Respondents' third claim is based upon Supervisor Butterfield's October 14, 1980 letter to HUD advising that the Town opposed approval of the Matinecock Court project and recommending that HUD disapprove it.

Respondents alleged that on July 29, 1980, HUD's Deputy Area Director invited Housing Help to file an application for a Section 8 1980-81 funding allocation for Matinecock Court. Within 30 days, Housing Help and another organization, National Housing Partnership, filed a joint application for such funding.

Pursuant to Section 213 of the Housing and Community Act of 1974, 42 U.S.C. §1439 (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. 97-35, the views of the local government must be sought on the question of whether the Section 8 proposal is consistent with the municipality's HAP.[6] This procedure was followed in this case, and on October 14, 1980, Supervisor Butterfield wrote to HUD, advising HUD truthfully that the Housing Help application was inconsistent with Huntington's HAP, which contained zero new construction units as a goal. He also correctly advised that the project could not be

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[6]The Town applied for federal funds for community development block grant ("CDBG") programs for program years commencing in 1975 through 1982. Approval of a municipality's HAP is a prerequisite to receipt of funds under the Community Development Act of 1974, 42 U.S.C. §5304(c)(1) (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. 97-35. HUD approved all HAP's submitted by the Town during that period of time pursuant to 42 U.S.C. §§1437, 1439; 42 U.S.C. §§5304(c)(1); and 24 C.F.R. §570.306(c)(3)(i).

carried out within the existing single family R-40 (1-acre) zoning.

Notwithstanding the Supervisor's comments, HUD ranked the Matinecock Court project in a four-way tie for sixth place, among the 16 proposals concurrently competing for Section 8 funds in Suffolk County.[7] Neither the inconsistency with the HAP nor the incompatibility with the Town's zoning deterred HUD from giving the proposal what the Second Circuit termed "a relatively favorable response", 689 F.2d at 394-395.

Moreover, HUD's Acting Area Manager Myerson stated that, "should Section 8 New Construction funds become available to the New York Area Office in the future, and should some portion of these funds be made available to Suffolk County, then Matinecock Court's previous ranking (of sixth place) will still not prevent it from receiving these 'hypothetical' Section 8 funds". She further stated that at that future date, Matinecock Court could be reactivated and "evaluated anew" in light of HUD's then current criteria, so that it could conceivably be "ranked as highly as first" among the Suffolk County proposals then under consideration.

The record reflects that the Butterfield letter had no effect whatsoever upon the failure of the Matinecock Court Project to receive funding. In the Area Manager's words, "none of [the sixteen competing Suffolk County projects] were funded since the expected fiscal year 1981 funds never materialized—to be sure, the type of Section 8 funding for which these projects competed has been eliminated."

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[7]The Second Circuit mistakenly attributed sponsorship of another of the sixth place finishers, Huntington Park, to the Town of Huntington, 689 F.2d at 393. Huntington Park was a privately sponsored proposal. The error probably derives from HUD Area Director Weiner's June 19, 1981 affidavit, in which he states that "The only other project from the Town of Huntington which was submitted in response to the June, 1980 NOFA was a proposal entitled 'Huntington Park'." The meaning would have been clearer if the words "proposed to be built in" were substituted for the word "from".

Nor did the Town's HAP, containing a zero new rental units goal, referred to in Supervisor Butterfield's letter, prevent funding of the project: Ms. Myerson stated that, "should sufficient HUD new construction rental funds become available for use in Suffolk County during fiscal year 1982, *then HUD will require Huntington to amend its HAP* [to provide for a goal of 100 units of new or substantially rehabilitated rental housing]." (emphasis in original).

The courts below did not address the question as to whether the Town's "opposition" to the Matinecock Court proposal, as evidenced by the Butterfield letter,[8] stated facts upon which relief could be granted.

REASONS FOR GRANTING THE WRIT

I.

Summary of Reasons

There are more than 82,000 local governmental units in the nation, many of which have adopted zoning codes.[9] In recent years these codes have often been challenged as exclusionary. This case presents important questions as to the proper role of the federal courts in the determination of such challenges. The decision of the Second Circuit, if followed in other circuits, under-

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[8]Even a broad reading of Complaint ¶19 which, in connection with the class action allegations, poses the question "whether Huntington's interference with the construction of Matinecock Court project" was unlawful, does not provide support for the ruling below. If the "interference" is claimed to have been the Town's short-lived submission of a 150-unit low income project, (HUD's pre-approval of which was challenged in the now-dismissed second cause of action), HUD's representatives made it clear that the Town's project and Matinecock Court did not compete for the same funds, and the submission by the Town of its 150-unit proposal was in no manner responsible for the failure of Matinecock Court to receive funding.

[9]In New York State, 1,038 of 1,546 local governments have enacted zoning ordinances.

cuts the standing rules established by this Court in *Warth* v. *Seldin*, 422 U.S. 490 (1975) and *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and, in particular, the requirements that plaintiff (1) allege a distinct and palpable injury to himself, and (2) demonstrate that he personally would benefit in a tangible way from the court's intervention. The ripeness issue concerns whether a plaintiff can bring an action against a government body without affording that body an opportunity to act, in a discriminatory manner or otherwise, as to the relief the plaintiff seeks. This case also presents in appropriate form the question as to whether application for rezoning of a specific parcel of property should, under principles of comity and federalism, properly be heard in the first instance in the federal courts, or whether zoning determinations, "peculiarly within the province of state and local legislative authorities," *Warth* v. *Seldin*, 422 U.S. at 508, n. 18, should first be made elsewhere.

This case also raises the question whether there is any public policy reason to prefer that the federal courts hear such controversies, in light of the apparent willingness of the state courts to decide these questions, which they are free to do without the inhibitions of Article III. *Berenson* v. *Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), *Southern Burlington County NAACP* v. *Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); *Jersey Ruling Aids Housing For Poor*, New York Times, January 21, 1983, at 1, col. 1.

II.

The Second Circuit decision conflicts with this Court's standing rules.

A. "Distinct and Palpable Injury".

Despite HUD's statements that all new construction Section 8 funding had been eliminated for fiscal 1981, and that none had

been made available to the New York Area for fiscal 1982 (HUD Statement of Undisputed Facts Pursuant to Local Rule 9(g), ¶6), and respondents' admission that "none of the plaintiffs have the financial capability to construct the Matinecock Court project without federal financial assistance", the Second Circuit refused to "exclude the possibility of Section 8 monies being available for Matinecock." 689 F.2d at 395.

This holding erroneously failed to take respondents' admissions into account. *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, n.22 (1979); *Glover River Org.* v. *United States Department of Interior*, 675 F.2d 251, 254, n.3 (10th Cir. 1982) and was based only upon speculation. Moreover, treating the allegations of the complaint as true for purposes of a dismissal motion based upon standing (which was improper in the face of petitioners' request for Rule 56 relief and in light of both lower courts' actual consideration of evidence outside of the pleadings) only highlights the respondents' position that, in the absence of Section 8 funds, the Matinecock Court Project could not be built. The focus of the entire complaint, including the dismissed second and third causes of actions, was upon petitioners' (and HUD's) alleged interference with respondents' quest for Section 8 funds. The complaint freely concedes the respondents' dependence upon federal subsidies for the construction of their project. Complaint ¶¶15, 27.

More critical here, however, is the fact that the Second Circuit's formulation of the issue, if followed in other Circuits, will permit plaintiffs to prosecute actions without any demonstration whatever that they will suffer "distinct and palpable injury" at the hands of the defendant,[10] which showing has repeatedly been termed one of the "Article III minima", whether or not the action is brought under the Fair Housing Act. *Warth* v. *Seldin*, 422 U.S. at 501; *Gladstone Realtors* v. *Village of Bellwood*, 441

[10]Or that they "were genuinely injured", *Havens Realty Corp.* v. *Coleman, supra*, 102 S.Ct. at 1123 n.16.

U.S. at 100; *Havens Realty Corp.* v. *Coleman*, 102 S. Ct. 1114, 1123 (1982). Like the plaintiffs in *Warth*, the respondents here "rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [petitioners] acted otherwise, and might improve were the Court to afford relief". *Warth* v. *Seldin, supra*, 422 U.S. at 507.

Respondents did not, and could not, demonstrate that their alleged injury is "fairly traceable to the [petitioner's] acts or omissions." *Village of Arlington Heights* v. *Metropolitan Housing Development Authority, supra*, 429 U.S. at 261; *Simon* v. *Eastern Ky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The record clearly shows that total failure of funding, and not petitioner's zoning policies, was solely responsible for respondents' inability to construct Matinecock Court.[11] This case presents for decision the question reserved by the Court in *Arlington Heights*, 429 U.S. at 261, n.7, whether "termination of all available assistance programs would preclude standing".

In an era of declining governmental support for entitlement programs, it is of importance that the question be answered by the Court. We further suggest that this question must be answered in the affirmative; otherwise, there would exist no rationale for the *Arlington Heights* exception to the *Warth* rule: that a

[11]Even if one accepts respondents' undocumented claims that their future chances of receiving Section 8 funds for Matinecock will be "substantially reduced" by the lack of appropriate zoning, and that their proposal was already downgraded by HUD pursuant to 24 C.F.R. §880.306 (b)(iv), which makes "permissiveness of current zoning" a selection factor, they do not possess standing to challenge either the zoning or HUD's ranking procedures in the absence of available funds which would at least breathe potential life into their project. In failing to appeal from the dismissal of the second and third causes of action, on the grounds that HUD had committed itself to compel the Town to amend its HAP, and would re-rank all proposals, including Matinecock Court, when and if funding became available respondents recognized that their claims against HUD were not viable at this time, but could be revived at any future time funds became available. It is difficult to understand how the claims against the Town possess greater viability at this time than these now-abandoned claims against HUD.

plaintiff's Fair Housing Act claim "focus on a particular project" which is "not dependent on speculation about the possible actions of third parties not before the court", in contrast to being but a "generalized grievance", *Village of Arlington Heights* v. *Metropolitan Housing Development Authority, supra,* 429 U.S. at 264. It seems clear that the Court had in mind a viable, and not a hypothetical, housing project: otherwise there would be no way for a plaintiff to show " 'an actionable causal relationship' between [a municipality's] zoning practices and his asserted injury."[12]

B. "Tangibly Benefit From the Court's Intervention".

The district court's finding that "there are no Section 8 new construction . . . funds now available" was affirmed by the Second Circuit, 689 F.2d at 395. The district court's further finding

[12]The Court's "specific project" exception has been criticized by the commentators because it "fails to take into account the . . . substantial possibility that none of the named plaintiffs would actually be afforded residence in the project once it was built". Sager, *Insular Majorities Unabated*: Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 Harv. L.Rev. 1373, 1387-88 (1978); Schwem, *Standing to Sue in Fair Housing Cases,* 41 Ohio St.L.J. 1, 25-61 (1980). The Second Circuit has apparently adopted Professor Sager's suggestion that the "specific project" exception came about because this Court perceived "that the claim of right by the individual plaintiffs [in *Arlington Heights*] was a claim to an intermediate state of affairs, the existence of which favored their chances for the ultimate benefit of improved housing for themselves". Sager, *op cit. supra,* at 1387-88. If that was indeed the Court's perception, reiteration in *Arlington Heights* of *Warth's* "substantial probability" of the project's "materializing" language, neither adequately communicates such perception nor squares with the test requiring "direct and palpable injuries that are 'fairly traceable' to petitioner's actions," *Havens Realty Corp.* v. *Coleman, supra,* 102 S.Ct. at 1122. The Fair Housing Act prohibitions themselves focus upon discriminatory acts with regards to "a dwelling", 42 U.S.C. §3604(a). The specific project requirement thus relates to the *actual* realities of a project, including the area of its probable and immediate impact, and is not some formalistic, hypothetical requirement, which simply provides a rationale for finding standing in a sympathetic plaintiff to make any claim he may desire within the parameters of the Fair Housing Act.

that "it is unlikely that any such subsidies will be available in the near future" was only addressed obliquely by the appeals panel, which held "we cannot exclude the possibility of Section 8 monies being available for Matinecock", 689 F.2d at 395.

On the basis of the latter statement, the Second Circuit sustained respondents' standing to challenge petitioners' zoning code, although it conceded that "those who have absolutely no realistic financing capability have no standing", 689 F.2d at 394. In light of the court's declination to "exclude the possibility" of financing, it found that the removal of the alleged zoning barrier "would benefit [respondents] in a tangible way from the court's intervention" because "all that is required is a showing that such relief be reasonably designed to improve the opportunities of the respondents" 689 F.2d at 394.

Having thus significantly diluted the *Warth* "substantial probability" test, the court explained why, in its view, respondents possessed standing thereunder:

> "Indeterminacy of financing alone, however, is not enough to dismiss such an action, since the multitude of factors affecting ultimate financing capability are too variable to permit certainty in prediction. The ebb and flow of the economy, long term interest rates, and the political environment all affect the existence and level of private and governmental funding. Moreover, the likelihood of Housing Help's securing financing is in part related to whether its proposal complies with local zoning ordinances. Private lenders as well as government agencies will be understandably reluctant to make sizable commitments of funds for projects which violate zoning laws and which, at best, cannot be started before years of litigation are completed. In such circumstances, dismissal of a complaint because of lack of committed financing may well prevent any litigant from challenging a zoning ordinance." 689 F.2d at 394.

The Second Circuit thus avoided any discussion of the key element of Arlington Heights, that there be a "substantial probability" that the ultimate relief sought will be gained by a plaintiff's success in court. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* 429 U.S. at 264. Here, the ultimate relief sought is housing. Despite the affirmed finding that there is no current financing available, and the demonstration in the record that future funding is highly unlikely,[13] and hence that there is currently almost no possibility that housing would result from this litigation, the court found standing. Article III would be meaningless if standing could thus be found upon the slightest possibility of some future benefit.

As a matter of policy, as well as precedent, and no matter how worthy the cause, a court should not exercise its extraordinary powers (particularly in a case in which it is called upon to perform a fundamental function of a local government legislative body) unless it is able to remove the final barrier to ultimate relief. *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 154-55 (1951) (Frankfurter, J. concurring). Since zoning challenges are among "the most important and delicate of [a court's] responsibilities," the courts should insure that "such adjudication does not take place unnecessarily"; *Schlesinger* v. *Reservist Committee to Stop the War,* 418 U.S. 208, 221 (1974).

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[13]Interestingly, respondents made no effort to rebut the affidavits submitted by HUD on the future financing question, preferring to rest upon their "Catch 22" argument: that without zoning, they would not qualify for future Section 8 monies, and, to deny them standing to challenge the zoning because of the absence of financing would deprive them permanently of the opportunity to litigate. See footnote 11, *supra.* Even if this argument, adopted by the Second Circuit, 689 F.2d at 394, were valid, it would not justify an exception to the Article III requirement that there exist a "case or controversy". If low-income housing cannot be built without government subsidies, and such subsidies are not forthcoming, no practical relief would follow entry of a judgment for a plaintiff in a case such as this; indeed, harm might ensue, in that the municipality might be compelled to rezone a property for a use which could never be constructed, thus effectively sterilizing the property.

The legislative history of the Fair Housing Act makes it clear that the "ultimate relief" intended to be available under the Act was the "elimination of discrimination in the sale or rental of housing" (Remarks of Sen. Mondale, 114 Congressional Record, March 4, 1968, p. 4975), not to "magically solve all the housing problems" of Blacks (Remarks of Rep. Fascell, 114 Congressional Record, April 10, 1968, p. 9575). Whatever affirmative duty was created by the Fair Housing Act, *See Acevedo* v. *Nassau County*, 500 F.2d 1078 (2d Cir. 1974), does not exceed providing some available space for low-income housing. *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (on remand); *see* notes 4 and accompanying text, *supra*. The basic purpose of the legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it." (Remarks of Sen. Mondale, *supra*, February 20, 1968, p. 3421).

By no stretch of the imagination is a rental unit in a hypothetical low-income housing complex "offered to the public", when, by reason of lack of funds, it cannot be built.

III.

The Second Circuit's decision inappropriately places the federal courts in the zoning business.

Despite respondents' failure to apply for a rezoning of their option land, the Second Circuit permitted this action to proceed, with the ultimate objective of "ordering Huntington and its officials to grant . . . multi-family zoning and to permit construction of [the Matinecock] project." In so doing, the court ignored all of the case authority, and considerable accumulated wisdom, which dictate that the federal courts should stay out of the zoning business. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).

Under traditional legislation (and Huntington's is no exception), the body authorized to rezone land (the town board) is mandated to consider, at a public hearing, all of the local needs, and the public health, safety, morals and general welfare. The topics considered at such a hearing range from traffic congestion to sewage disposal, drainage, proximity to schools, topography, actual development of neighboring properties, dilution of property values, and aesthetics, to name only a sample, New York Town Law §261 (McKinney 1965). The property owner seeking a rezoning attempts to show the appropriateness of the rezoning; members of the public, including neighboring property owners, are also entitled to present evidence and comment on all of these matters of uniquely local concern. *Randolph* v. *Town of Brookhaven*, 37 N.Y.2d 544, 337 N.E.2d 763, 375 N.Y.S. 2d 315 (1975).

Since this action is based upon allegations that some act by the Town was discriminatory, it is an essential element of the cause of action that the Town be afforded an opportunity to act. Since there was never a zoning application, there was neither a public hearing nor a denial of the respondents' relief.

In *Arlington Heights*, the Court had before it for review lengthy proceedings before a Plan Commission and Village Board, which preceded a 6-1 denial of MHDC's rezoning application. The Court then attempted to determine "whether invidious discriminatory purpose was a motivating factor", which task, it was said, "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available". *Village of Arlington Heights* v. *Metropolitan Housing Development Authority, supra*, 429 U.S. at 266. Here, there was no such record upon which the action and intent of the Town can be evaluated.

Closer to the heart of the matter, however, is the undisputed fact that there never was a "refusal to rezone" whose motivation could be tested, because there was never an application which was susceptible of being refused. That being so, the matter is not ripe for determination at all, whether or not an adequate record exists. As Justice Frankfurter wrote:

> "Although a litigant is the person most directly affected by the challenged action of the Government, he may not have 'standing' to raise his objections in a court if the action has not, as it were, come to rest. Courts do not review issues, especially constitutional issues, until they have to. In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary."

Anti-Fascist Committee v. *McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J. concurring) (citations omitted). In a footnote, Justice Frankfurter explained:

> "Government action is 'final' in the sense here involved when at no future time will its impact on the petitioner became more conclusive, definite or substantial."

Id. at 154, n.4.

It is clear that there has been no "final" action taken by the Town against the respondents. Only a determination by the Town of a rezoning application would render the impact of Huntington's planning and zoning process on the respondents "conclusive, definite and substantial".

The failure of respondents to make proper application for a rezoning also handicapped the petitioners so as to make it impossible for them to weigh all of the considerations for and against the desired rezoning, on the basis of reliable information, marshalled by those persons, including respondents, who deem their individual interests to be most directly affected by the present or proposed zoning classification of the option property. In *Arlington Heights*, the Court remarked that "departures from normal procedural sequence . . . might afford evidence that improper purposes are playing a role", *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, *supra*, 429 U.S. at 267. See also, *Kennedy Park Homes Association, Inc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. den.*, 401

U.S. 1010 (1971) (sudden action to adopt moratorium on new subdivisions and to rezone plaintiff's land as open space, upon learning of plans for low-income housing project); *United States* v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) (incorporation drive begun within three weeks of issuance of a HUD feasibility letter for low-income housing; new city, upon its incorporation, adopts ordinance prohibiting multiple-family dwellings). In this case, petitioners have essentially been prejudiced by their careful adherence to the normal rezoning procedures.

In *Arlington Heights*, the Court noted that MHDC had "expended thousands of dollars on the plans and on the studies submitted to the Village in support of the petition for rezoning." *Ibid.*, 429 U.S. at 262.

This Court has termed zoning laws essential tools for "effective urban planning", *Warth* v. *Seldin, supra*, 422 U.S. 490, 508 n.18 (1975), "peculiarly within the province of state and local legislative authorities". *Id.* The "normal democratic process" therein referred to by Justice Powell was available to the respondents here, but was left unused. Justice Brennan, dissenting in *Warth*, also remarked that consideration of the merits of that case "could involve grave sociological and political ramifications". *Id.* at 520.

Basic political functions, such as the zoning of land, ought to be left to the politically responsive branches of government. Particularly is this so where state law and the Town's code provide for flexibility and creativity in the creation of zoning districts, in the rezoning of particular lands, and, where appropriate, in affording relief from the strict requirements of a zoning code. New York Town Law §265 (McKinney Supp. 1982-1983). The necessity to weigh competing social and political interests renders these issues nonjusticiable under Article III. *Baker* v. *Carr*, 369 U.S. 186 (1962).

Adjudication of these sensitive issues which can potentially invalidate Huntington's long-standing zoning plan should not

take place unless and until it is necessary. *Schlesinger* v. *Reservist Committee to Stop the War*, 418 U.S. 208, 221 (1974). The Second Circuit's decision thus departs from tradition, case authority, and good sense. Respondents have thus not alleged facts sufficient to make out a present case or controversy. *Warth* v. *Seldin, supra*, 422 U.S. at 516.

CONCLUSION

A writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit to review that court's decision and judgment dated September 28, 1982.

Dated, Melville New York
February 8, 1983

Respectfully submitted,

RICHARD C. CAHN
Special Counsel, Town of Huntington
CAHN WISHOD & WISHOD,
of Counsel
Counsel for Petitioners
534 Broadhollow Road
Melville, N.Y. 11747
(516) 694-2300

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ALEXANDER L. STEVAS,
CLERK

82 No. 1339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE and KATHLEEN FERRARO,

Petitioners,

—v.—

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, ELLA OWENS, CARRIE HOWARD, THELMA LATTA, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RICHARD C. CAHN
Special Counsel, Town of Huntington
CAHN WISHOD & WISHOD
of Counsel
Counsel for Petitioners
534 Broadhollow Road
Melville, N.Y. 11747
(516) 694-2300

February 8, 1983

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APPENDIX

Opinion of the Court of Appeals for the Second Circuit

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR the ADVANCEMENT OF COLORED PEOPLE, Housing Help, Inc. Mabel Harris, Ella Owens, Carrie Howard, Thelma Latta, Perrepper Crutchfield, Kenneth L. Cofield, Plaintiffs-Appellants,

—v.—

The TOWN OF HUNTINGTON NEW YORK, United States Department of Housing and Urban Development Samuel Pierce, Kenneth C. Butterfield, Claire Kroft, Kenneth Deegan, Edward Thompson, Joseph Clemente, Defendants,

The Town of Huntington, New York, Kenneth C. Butterfield, Claire Kroft, Kenneth Deegan, Edward Thompson, Joseph Clemente, Defendants-Appellees.

No. 1224, Docket 82-6030.

United States Court of Appeals,
Second Circuit.

Argued June 1, 1982.
Decided Sept. 28, 1982.

Richard F. Bellman, New York City (Lewis M. Steel, Steel & Bellman, P.C., New York City, Thomas Atkins, Curtis Rodgers, Margrett Ford, N. A. A. C. P., New York CCity, of counsel), for plaintiffs-appellants.

Richard C. Cahn, Melville, N. Y. (Cahn, Wishod & Wishod, Melville, N. Y., of counsel), for defendants-appellees Town of Huntington, N. Y., Kenneth C. Butterfield, Claire Kroft, Kenneth Deegan, Edward Thompson, Joseph Clemente.

Opinion of the Court of Appeals for the Second Circuit

Before KAUFMAN and WINTER, Circuit Judges, and WARD, District Judge.*

RALPH K. WINTER, Circuit Judge:

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, Costantino, Judge, dismissing for lack of standing a complaint alleging that a Huntington, New York zoning ordinance is racially discriminatory and therefore invalid. We reverse and remand.

BACKGROUND

The complaint alleges the following facts. Believing there exists a need for increased low and moderate income housing in Huntington, New York, plaintiff-appellant Housing Help, a non-profit housing assistance corporation, secured in 1978 an option to purchase a 14.6 acre tract in the Greenhaven/East Northport section of that town,[1] a predominantly white area currently zoned for single-family residential units on one acre lots. Housing Help hoped to secure federal funding to construct on the site a 162 unit multi-family housing project to be known as Matinecock Court. Huntington officials were apprised of Housing Help's goals, and on February 22, 1980, Housing Help requested that they schedule a public hearing to consider amending the zoning ordinance to permit the project. That request was referred to the Huntington Planning Department for study. The Department has yet to report.

The project was to be developed as a so-called HUD Section 8 (42 U.S.C. §1437f (1976)) new construction housing program

*Honorable Robert J. Ward, United States District Judge for the Southern District of New York, sitting by designation.

[1]Huntington is a town of approximately 200,000 people located in the northwest corner of Suffolk County, New York. Ninety-five percent of the population is white and 5% is minority, largely Black and Hispanic.

in cooperation with National Housing Partnership, an organization sponsoring low cost housing projects. Section 8 funds are available only for projects in towns which have submitted to HUD a Housing Assistance Plan (HAP), 42 U.S.C. §5304(a)(4) (Supp. IV 1980) specifying municipal housing needs, and realistic goals to accommodate those needs, including new construction of HUD assisted rental units. 42 U.S.C. §5304(a)(4)(B) (Supp. IV 1980). If the goals are unrealistic, HUD cannot approve the HAP.

At the time of Judge Costantino's decision, a 1979-1982 HAP was in force in Huntington. Although the HAP provided a goal of "zero" for new projects, HUD approved it since there were insufficient federal funds to build any projects. However, HUD informed Huntington that if funds became available a new HAP would be required. Under the new HAP, a goal of 100 new or substantially rehabilitated units would be required.

When funds are available, HUD publishes a Notice of Funding Availability (NOFA) and developers respond with proposals for projects in designated sub-areas. When a proposal is received from a private developer, HUD gives the affected municipality an opportunity to comment. Under certain circumstances, a municipality's objection will effectively veto a proposal. For example, if the municipality objects because the proposal is inconsistent with a HUD-approved HAP, the proposal must be rejected. 42 U.S.C. §1439 (1976). In addition, if the number of units in the proposal exceeds the town's HAP goal by more than 20%, HUD cannot approve it. If no dispositive objection exists, the proposal is then compared to other proposals in the same sub-area, ranked in relation to them, and either funded or not funded depending on the ranking and available monies.

In the present case, a NOFA was published for Suffolk County on June 19, 1980, and Housing Help then proposed their 162-

unit Matinecock development. HUD should have rejected the project as proposed, however, because it exceeded by more than 20% the governing zero-goal HAP and the 100-unit goal in the would-be HAP as well.[2] HUD nevertheless ranked Matinecock Court in a four way tie for sixth place. One of the other sixth place finishers was Huntington Park, a proposal sponsored by the Town of Huntington for a project in Huntington's multi-family zone. The sixth place ranking constituted qualified approval of both projects by HUD.

On February 23, 1981, the Huntington Branch NAACP, its president, Housing Help, and certain named individuals in need of low and moderate income housing in Huntington filed this four-count complaint against both the Town of Huntington and HUD. Count 1 alleges that Huntington's zoning ordinance discriminates against plaintiffs in violation of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601-3631 (1976), the Civil Rights statutes, 42 U.S.C. §§1981, 1982 and 1983 (1976), and the Fourteenth Amendment. Count 2 alleges that qualified approval of the Huntington Park project was also discriminatory. Count 3 alleges that HUD's approval of the "zero" goal HAP violated Title VIII and the Housing and Community Development Act of 1974, 42 U.S.C. §5301, *et seq.* (1976) insofar as the HAP "contribute[s] to and perpetuate[s] racial segregation." Finally, Count 4 alleges that Huntington's zoning law also violates the New York Town Law insofar as the zoning scheme was exclusionary and discriminatory.

Meanwhile, Section 8 funds were effectively eliminated for Fiscal Year 1981. On August 13, 1981, a motion to dismiss was filed by both HUD and Huntington. On January 25, 1982, Judge Costantino granted the motion on the grounds that the

[2]Plaintiffs represent that its proposal can and will be scaled down to comply with the 20% threshold. Defendants have not questioned this representation.

plaintiffs lacked standing. Relying on this Court's opinion in *City of Hartford* v. *Town of Glastonbury*, 561 F.2d 1048, (2d Cir. 1977) (en banc) *rev'g*, 561 F.2d 1032 (2d Cir. 1976), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 766, 54 L.Ed.2d 781 (1978), he held that the virtually complete absence of Section 8 funds rendered meaningless the relief requested in the complaint. Judge Costantino reasoned that, because of the lack of such funding, construction of Matinecock would not result from either amendment of the "zero" goal HAP or invalidation of the zoning ordinance.

DISCUSSION

[1]The principal issue on appeal is whether Judge Costantino erred in trying plaintiffs' standing to the availability of specific federal housing subsidies.[3] The question is whether, because there

[3]Plaintiffs did not appeal from the dismissal with respect to HUD because Huntington's requisite goal will rise to 100 if Section 8 funds become available and Housing Help can revise downward the number of units proposed in Matinecock. In addition, the Town itself has withdrawn the Huntington Park project, thus rendering Count 2 moot.

Certain additional issues can be disposed of summarily. In Point III of their brief, appellees ask that the ordinance be upheld because it is not a clear abuse of discretion. Point IV disputes appellants' ability to demonstrate discriminatory intent, and Point V claims the Town's zoning and building judgments are entitled to deference. Each of these arguments is overcome by the allegation of racially discriminatory intent.

In Point VI appellees justify dismissal on (a) failure to invoke substantially equivalent state judicial remedies as required under Section 810(d) of Title VIII, 42 U.S.C. §3610(d) (1976), and (b) failure to exhaust specific local remedies in the form of filing a formal application for rezoning. With respect to (a), appellants sued under Section 812 of the Act, a specific alternative to Section 810 which allows plaintiffs to seek "immediate judicial review" in a federal action. *Gladstone, supra*, 441 U.S. at 106, 99 S.Ct. at 1611. With respect to (b) the existence of Section 810 indicates that Congress gave explicit consideration to the availability of local remedies and the lack of an exhaustion requirement in

(Footnote continued on following page)

are no Section 8 housing monies presently available, the injuries asserted by plaintiffs are not "likely to be redressed if the requested relief is granted." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979). If so, an adjudication as to the validity of the ordinance would resolve an abstract dispute in which the plaintiffs are not "in danger of suffering any particular concrete injury as a result. . . ." *United States* v. *Richardson*, 418 U.S. 166, 177, 94 S.Ct. 2940, 2946, 41 L.Ed.2d 678 (1974). That is not a proper function of courts. However, the requirement that the relief requested be likely to redress the injuries alleged by a plaintiff is not a demand for complete certainty. All that is required is a showing that such relief be reasonably designed to improve the opportunities of a plaintiff not otherwise disabled to avoid the specific injury alleged. To ask plaintiffs to show more than that they "would benefit in a tangible way from the court's intervention," *Warth* v. *Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975), would be to close our eyes to the uncertainties which shroud human affairs.

(Footnote continued from previous page)

Section 812 strongly suggests that such a requirement was not intended. Moreover, the purpose of allowing "immediate judicial review," *id.*, as an alternative to local remedies would be seriously undercut if Section 812 actions were conditioned upon prior exhaustion of state administrative remedies. Finally, since the challenged action is a zoning ordinance rather than an administrative decision, it is not clear that realistic administrative remedies exist.

Finally, appellees contend that plaintiffs' claim is time-barred because Section 812 requires that a complaint be filed within 180 days of the alleged discrimination and the zoning ordinance was not challenged within 180 days of its passage. We reject this claim also. The relevant act is the denial of approval of Matinecock and the complaint was thus filed well within the statutory period. Indeed, appellees' argument would preclude any challenge to the ordinance under Title VIII since Title VIII itself was enacted more than 180 days after the ordinance. Moreover, the alleged violations are continuing. *See Havens Realty Corp.* v. *Coleman*, —— U.S.——, ——— — ——, 102 S.Ct. 1114, 1123-1125, 71 L.Ed. 2d 214 (1982).

[2, 3] Where long term financing is the issue, it is particularly unreasonable to ask plaintiffs to prove more than some reasonable prospect for future financing. To be sure, those who have absolutely no realistic financing capability have no standing, *see Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 n.7, 97 S.Ct. 555, 561 n.7, 50 L.Ed.2d 450 (1977), because, as to them, invalidation of an offending ordinance would afford only moral satisfaction rather than a realistic opportunity to proceed with construction. Indeterminacy of financing alone, however, is not enough to dismiss such an action, since the multitude of factors affecting ultimate financing capability are too variable to permit certainty in prediction. The ebb and flow of the economy, long term interest rates, and the political environment all affect the existence and level of private and governmental funding. Moreover, the likelihood of Housing Help's securing financing is in part related to whether its proposal complies with local zoning ordinances. Private lenders as well as government agencies will be understandably reluctant to make sizable commitments for funds for projects which violate zoning laws and which, at best, cannot be started before years of litigation are completed. In such circumstances, dismissal of a complaint because of a lack of committed financing may well prevent any litigant from challenging a zoning ordinance.

[4] Plaintiffs have alleged diligent efforts to secure funding under an existing federal program and a relatively favorable response by HUD officials. We believe those allegations are sufficient notwithstanding the present unavailability of Section 8 funds

In *Village of Arlington Heights, supra,* both MHDC, a nonprofit housing developer, and individual plaintiffs challenged a village zoning ordinance which precluded the development of a low income housing project. Part of the standing challenge cen-

tered on MHDC's need "to secure financing, qualify for federal subsidies and carry through with construction." *Id.* at 261, 97 S.Ct. at 561. The Court noted, however, that "all housing developments are subject to some extent to similar uncertainties." *Id.* Focusing on the specific project in question, the Court concluded that "[w]hen a project is as detailed and as specific as Lincoln Green, a court is not required to engage in undue speculation as a predicate for finding that a plaintiff has [standing]." *Id.* No doubt the detail referred to included MHDC's lease and contract of purchase of the land, both of which were conditioned upon securing re-zoning, and the specific plans that had been drawn up on the project. *Id.* at 256-58, 97 S.Ct. at 558-559. The record here indicates a sufficiently similar degree of detail on the part of Housing Help. An option to purchase the 14.6 acre site upon which Matinecock Court would be built is alleged to have been secured,[4] and detailed plans as to the number and nature of the dwelling units have been drafted. Like *Arlington Heights*, "[t]he challenged action . . . stands as an absolute barrier to constructing the housing [Housing Help desires] to place on the [Greenhaven/East Northport] site." *Id.* at 261, 97 S.Ct. at 561. Invalidation of the challenged ordinance, therefore, would tangibly improve the chances of construction of Matinecock Court.

City of Hartford v. *Town of Glastonbury*, *supra*, is inapposite. In that case, Hartford challenged HUD's Fiscal Year 1975

[4]At oral argument, appellees raised issues as to the nature of Housing Help's option, a copy of which is not in the record and apparently has not been examined by appellees. Treating this as a motion for summary judgment, however, the burden is on appellees to show there is no set of facts arising under the complaint upon which plaintiff can succeed. Having failed to conduct even the most elementary discovery, appellees can ask us only to construe the pleadings in the light most favorable to appellants. An allegation of an "option" to purchase the particular parcel of land is sufficient to avoid dismissal under *Arlington Heights*, *supra*. Further consideration of this point must await development of the evidence.

waiver of its "expected to reside" requirements as to applications by certain Connecticut towns for Community Development Block Grants on the grounds that the waiver violated Title VI. The panel was sharply divided on whether Hartford would in fact have received more funds if proper applications by the other towns were required. For our purposes, the critical fact is that the majority concluded there was no likelihood that Hartford would benefit from a successful challenge to applications made by the other towns. The funds in question were apparently designated for one fiscal year and had been spent by the time of the complaint. Moreover, the other towns gave every indication of being able to submit a proper application if necessary. As a result, the relief sought would not have benefited Hartford.

In this case, we cannot exclude the possibility of Section 8 monies being available for Matinecock. Section 8 has not been eliminated and the availability of Section 8 monies in subsequent years is thus uncertain. Unlike *City of Hartford*, therefore, the relief sought here may benefit the plaintiffs.

CONCLUSION

The judgment of the District Court is reversed and the case is remanded.

Opinion of the District Court, Eastern District of New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

HUNTINGTON BRANCH NAACP, HOUSING HELP, INC., MABEL HARRIS, ELLA OWENS, CARRIE HOWARD, THELMA LATTA, PERREPPER CRUTCHFIELD, KENNETH L. COFIELD,

Plaintiffs,

—against—

THE TOWN OF HUNTINGTON, NEW YORK, UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, KENNETH C. BUTTERFIELD, CLAIRE KROFT, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE,

Defendants.

APPEARANCES:

Richard F. Bellman, Steel & Bellman, New York, New York, Thomas I. Atkins, Curtis Rodgers, and Margrett Ford, National Assoc. for the Advancement of Colored People, New York, New York (for plaintiffs)

Charles S. Kleinberg, Assist. U.S. Attorney, for Edward R. Korman, United States Attorney for the Eastern District of New York (for defendants HUD and Pierce)

Richard C. Cahn, Melville, New York (for defendants Town of Huntington, Butterfield, Kroft, Deegan, Thompson, and Clemente)

COSTANTINO, D.J.

This is a class action[1] brought on behalf of black, Hispanic

[1]This action was brought on as a class action under Fed. R. Civ. P. 23, but because of the court's decision herein, the merits of proceeding as a class have not been reached.

and lower income persons residing in the Town of Huntington and its surrounding areas who allegedly would qualify for residency in housing areas developed with the support of funding obtained pursuant to the Housing & Community Development Act of 1974. 42 U.S.C. §5301 *et seq.* Specifically, the plaintiffs claim to have been injured by discriminatory housing and zoning practices within the meaning of the Fourteenth Amendment and, more importantly, Title VIII of the Civil Rights Acts of 1968, 42 U.S.C. §3601 *et seq.*, which was designed to provide fair housing throughout the nation. In addition, plaintiffs have filed other causes of action based on 42 U.S.C. §§1981, 1982, 1983, and the New York State Town Law.

The named plaintiffs are as follows: Huntington Branch, National Association for the Advancement of Colored People ("NAACP"), whose purpose in society is to eliminate racial discrimination in housing, employment, education and other areas; Mabel Harris, the president of the NAACP in Huntington; Housing Help, Inc., a not-for-profit corporation which assists low income and minority people in securing housing in Huntington and its vicinity and also promotes low and moderate income housing in the Town of Huntington and its vicinity; and lastly, Ella Owens, Carrie Howard, Thelma Latta, Perrepper Crutchfield, and Kenneth L. Cofield, members of a minority and/or low income group who wish to obtain affordable housing in the Town of Huntington, but to date have been unable to do so because of its unavailability.

The Town of Huntington defendants are as follows: the Town of Huntington, a municipal corporation organized pursuant to the Town Law of the State of New York; Kenneth Butterfield, Supervisor of the Town of Huntington; and Claire Kroft, Kenneth Deegan, Edward Thompson and Joseph Clemente, members of the Huntington Town Board. These defendants will be referred to in this opinion as merely the "Town of Huntington."

The complaint was also filed against two federal defendants: the United States Department of Housing and Urban Development ("HUD"), and Samuel Pierce, the Secretary of HUD. These two defendants will be referred to jointly as "HUD."

These proceedings are now before the court on a motion to dismiss by both HUD and the Town of Huntington.[2] While the defendants set forth numerous grounds for dismissal, both HUD and the Town of Huntington maintain that the case must be dismissed for lack of standing. The court agrees, and for reasons set forth below, the action is dismissed. Before setting forth the court's conclusions of law, the court finds it necessary to provide a background to these transactions and the pertinent facts to date.

I. *BACKGROUND*

A. *Housing Assistance Plans*

To receive federal funds available through Community Development Block Grant ("CDBG") programs,[3] a town must submit to HUD a Housing Assistance Plan ("HAP") prepared in

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[2]Plaintiffs have also moved to amend their complaint pursuant to Fed. R. Civ. P. 15(a) and/or 15(b) to add a fifth cause of action challenging HUD's ranking of the Matinecock Court proposal. Amending the complaint to include such a claim would not alter the court's decision so the motion must be denied. However, for purposes of discussion in the court's opinion *infra*, the plaintiffs' contentions in the fifth cause of action will be discussed with plaintiffs' other claims.

[3]42 U.S.C. §5304(a)(2) (1981 Supp.) provides:

> No grant may be made pursuant to . . . this title unless an application shall have been submitted to the Secretary in which the applicant—
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> (2) formulates a program which (A) includes the activities to be undertaken to meet its community development needs and objectives, together with the estimated costs and general location of such activities, (B) indicates resources other than those pro-

(Footnote continued on following page)

accordance with the Housing and Community Development Act of 1975.[4] The HAP must specify the housing needs of the municipality and the municipality's realistic goals to accommodate community housing assistance needs, including goals for the new construction of HUD assisted rental units. *See* 42 U.S.C. §5304. If the goals for HUD assistance are unrealistic in light of present and expected availability of funds, HUD cannot approve the HAP submitted. 42 U.S.C. §5304(a)(4)(B); 24 C.F.R. §570.306(b)(3)(i). Each HAP generally covers a three-year period.

The most recent Town of Huntington HAP provides for years 1979-1982, which encompasses fiscal years 1980, 1981, and 1982 and becomes ineffective on October 1, 1982. With reference to the goals for the new construction of HUD assisted rental units, the recently revised HAP currently in effect for the Town of Huntington has "zero" goals for these projects. Since there are no funds presently available for such construction, HUD maintains that it approved Huntington's HAP as the goals provided therein are realistic under the circumstances. However, HUD has notified Huntington that if sufficient funds become available, then HUD will require Huntington to amend its 1979-1982 HAP to include a goal for the construction of 100 newly created units of new or substantially rehabilitated rental housing.

(Footnote continued from previous page)

> vided under this chapter which are expected to be made available toward meeting of its identified needs, activities, and objectives, including activities designed to revitalize neighborhoods for the benefit of low- and moderate-income persons, and (C) takes into account the effect of such activities on the involuntary displacement of low- and moderate-income persons and takes into account appropriate environmental factors;

Accordingly, CDBG funds can be used only to subsidize community development activities. The funds cannot themselves be used to build or provde rent subsidies for newly constructed low-income housing.

[4] *See* 42 U.S.C. §§1437, 1439; 42 U.S.C. §§5301-17.

B. *Procedural Requirements for Assistance and Proposed Huntington Projects*

Two procedures are available to receive funding from HUD and both have been the source of controversy in this case. First, applications for new construction funds under Section 8 of the Housing and Community Development Act, 42 U.S.C. §1437f, can be made pursuant to a Notice of Funding Availability ("NOFA"). When funds become available, HUD publishes a NOFA to which developers respond with preliminary proposals for housing projects in a given sub-area. The proposals in the sub-area—in this case Suffolk County— are then ranked against each other to determine priority for the available funds. This determination is based upon various factors including the proposed rents, design of the proposal, comments of the local municipality, feasibility of the project, and feasibility of the proposed location. HUD's approval of such an application is not a commitment for funds because all commitments are conditioned upon the submission of a final, more detailed proposal and HUD's approval thereof.

A NOFA was published by the HUD New York Area office for all of Suffolk County on June 19, 1980, and on August 28, 1980, plaintiff Housing Help, a Huntington based non-profit organization, submitted to HUD a preliminary proposal called "Matinecock Court" in response to the June 1980 NOFA. The Matinecock Court proposal was for 162 units at a cost estimate of $1,820,000.00.[8] After being ranked against sixteen other proposals submitted in response to the June 1980 NOFA, this project and "Huntington Park", the only other project submitted from

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[8]At the time the proposal was submitted, Housing Help had an option to purchase the 14.6 acre tract of land upon which it intended to build Matinecock Court.

Huntington, were tied with four other proposals for sixth place.[6]

Although it did rank the Matinecock Court proposal, HUD could not approve the project because the Town of Huntington objected to the Matinecock Court proposal. An application for housing assistance submitted to HUD from a private developer, such as Housing Help, Inc., rather than a municipality, must be forwarded for "comment" to the municipality in which the proposed project is to be built. If the town objects to the application on the grounds that it is inconsistent with its HAP, and HUD agrees that an inconsistency exists, then HUD cannot approve the application. 42 U.S.C. §1439. Furthermore, if the number of proposed units in the application exceeds the town's HAP goal by more than 20%, then HUD cannot approve the application.

Thus, the Matinecock Court proposal was objected to by Huntington on two grounds. First, the project was inconsistent with Huntington's zoning ordinances since the area in which Housing Help proposed to build Matinecock Court did not provide for multi-family housing.[7] Second, the project was incon-

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[6]Since the sixteen proposals submitted in response to the June 1980 NOFA were not received by HUD until the end of August 1980, the proposals could not be processed and ranked before September 30, 1980. The funds are distributed on a fiscal year basis; therefore, the proposals competed for 1981 funds. These funds, to have been made available pursuant to the June 1980 NOFA, are not forthcoming because of recent cutbacks in funding. In fact, Section 8 new construction money for 1981 was eliminated. Accordingly, *none* of the sixteen proposals submitted in response to the June 1980 NOFA received funding.

[7]The situs for Matinecock Court is zoned for one acre single family houses only. Multi-family housing construction is permitted only if the development is to be owned, maintained, and operated by the Huntington Housing Authority, or is within the urban renewal section of Huntington as provided by the Town's Comprehensive Plan. Since the Matinecock Court and project is not within that section of Huntington and Housing Help is not associated with the municipality, the Town's zoning ordinance would have to be amended to permit multi-family residential construction by private developers in the area in which Matinecock Court is proposed.

sistent with the 1979-1982 Huntington HAP which set forth "zero" goals for Section 8 assisted rental unit facilities. As noted, while it was ranked against the other Suffolk County proposals, Matinecock Court proposal was not approved by HUD.

Mainly on the basis of the Town of Huntington's objections to the Matinecock Court proposal, the plaintiffs allege in count one of the complaint that Huntington, through its zoning laws and the disapproval itself, had discriminated against the plaintiffs in violation of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601, *et seq.*, 42 U.S.C. §§1981, 1982 and 1983; and the Fourteenth Amendment. In count four, the plaintiffs in a pendant claim also contend that Huntington's zoning laws as applied to the Matinecock Court parcel of land are exclusionary, discriminatory and illegal under New York Town Law.

While the second method for obtaining funding has not directly led to problems in this action, it nonetheless merits discussion in that it sheds light on the plaintiffs suit against HUD because according to plaintiffs, it explains the low ranking that Matinecock Court received for its NOFA proposal. In the second method, known as the "Pre-Approved Site" procedure, municipalities are allowed to receive priority for Section 8 new construction funds so as to allow them to coordinate their community development activities with Section 8 construction. If pre-approval is granted, HUD can reserve the funds necessary to support the proposed construction thereby ensuring that funds for the ultimate proposal will be available. This also is conditional upon submission of a final proposal for a project to HUD and approval thereof. Like NOFA proposals, a proposal via the pre-approved site method must also meet HUD's site and neighborhood to receive approval by HUD, but unlike NOFA proposals, it does not compete with other proposals.

In seeking such funds, the Town of Huntington submitted to HUD the "Huntington Station" site, a 150-unit project, for pre-

approval. HUD granted pre-approval conditioned upon Huntington's amendment of its 1979-1982 HAP, which did not provide for new construction of HUD assisted rental units. Dependent on compliance with that condition, $1,012,140.00 was reserved from 1980 funds for the Huntington Station side. Thereafter, Huntington withdrew the Huntington Station proposal.[8] However, Huntington did revise its 1979-1982 HAP to once again specify "zero" goals for both HUD assisted newly constructed rental units and for HUD assisted substantially rehabilitated rental units.[9]

In reviewing the complaint and proposed amended complaint, the plaintiffs maintain that HUD's initial approval of the HAP for the Town of Huntington and presumably the amended HAP violated the provisions of the Housing and Community Development Act of 1974, 42 U.S.C. §5301 *et seq.*, in that the approval of the HAP with "zero" goal for Section 8 funding has "contributed to the perpetuation of racial discrimination, isolation and segregation in housing in the Town of Huntington and has

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[8]When these reserved funds site were not ultimately committed by HUD to the building of the Huntington Station project, the funds were classified as "recaptured" and were used to increase the funding on previously approved projects in the New York area that require additional money to remain feasible, and then only with the express authorization of the HUD Assistant Secretary of Housing.

Although not specifically discussed by the plaintiffs, even if these recaptured funds amounting to approximately $1,012,140.00 were used to fund the Matinecock Court project, this would still not be sufficient to fund the project as plaintiff Housing Help estimates that the project would cost at least $1,820,000.00 to complete. To be built, the Matinecock Court project would require additional funding.

[9]Due to the severe cutbacks in funding allocations, the policy in the New York Area Office of HUD is not to disapprove any HAPs which fail to increase the goals for HUD assistance and in light of such cutbacks, are realistic under the circumstances. Accordingly, this HAP was approved in view of current and projected availability of funding, but the Town was informed that should funds become available, Huntington will have to amend its HAP to include goals for Section 8 funding.

encouraged and contributed to the discriminatory interference by Huntington Town with the Matinecock Court project." *Amended Complaint*, ¶63. In addition, the amended complaint asserts that HUD's pre-approval of the Huntington Station project caused the Matinecock Court proposal submitted in response to the June 1980 NOFA to receive a low ranking.[10]

II. CUT-BACKS IN FUNDING AND PLAINTIFFS' STANDING

Among the numerous answers given to plaintiffs' contentions, defendants have asserted that no federal funds are available to subsidize the proposed project, and therefore, the plaintiffs are without a remedy. Although plaintiff NAACP contests this in its Memorandum in Opposition by characterizing it as a "self-serving [statement] by a HUD official", plaintiffs do not substantiate their objection in any way, FRCP Rule 56(e), and thus we must consider this factor in determining whether the plaintiffs have standing before the court to litigate their claims because, without federal funding, it is undisputed that plaintiffs will be unable to build Matinecock Court or any other project.

The status of funding for HUD's New York office for the Fiscal Year 1981 is in a current state of flux. Section 8 new construction and substantial rehabilitation funds have been eliminated entirely. The only funding presently available for use in Suffolk County is enough to fund 35 units in the Town of Smithtown. The only other potential source of HUD funding for Fiscal Year 1981 is a special pool for 1500 units of new construction

[10]In the original complaint, one of plaintiffs' causes of action was based on HUD's approval of the Huntington Station proposal itself. After the withdrawal of that proposal, the court dismissed this cause of action on June 24, 1981. This is different from the claim in the amended complaint which alleges that the pre-approval of Huntington Station caused the Matinecock Court proposal to receive a low ranking from HUD.

to be spread throughout the entire nation. Indeed, it is quite clear that there is no guarantee that HUD will receive any funding to subsidize HUD assisted newly constructed rental units in Suffolk County for the Fiscal Year 1981.

III. *CONCLUSIONS OF LAW–STANDING*

In responding to defendants' challenges to plaintiffs' standing, the court must first ascertain whether the defendants' acts injured the plaintiffs, and second, whether the plaintiffs' injury is capable of redress. *See Warth* v. *Seldin*, 422 U.S. 490 (1975). In answering these questions, the Court will focus on how they separately relate to the Town of Huntington and HUD. What is quite clear, however, is that for this court to redress plaintiffs' injury, if any, the plaintiffs must receive some form of Section 8 funding.

A. Plaintiffs Standing to Challenge HUD's Approval of the 1979-82 HAP

The plaintiffs maintain that HUD's approval of the 1979-82 Huntington HAP, containing "zero" goals for newly constructed or rehabilitated HUD assisted rental housing, was a violation of law, and ultimately caused the Matinecock Court project to receive a low ranking. However, if HUD forced the Town of Huntington to amend the HAP to include new goals consistent with the plaintiffs' wishes, it would not change the current status quo since there are no funds available for Fiscal Year 1981 to subsidize such housing.

In determining whether these plaintiffs have standing to challenge HUD's approval of the 1979-82 HAP, the court must examine the facts herein in light of the Second Circuit's holding in *City of Hartford* v. *Town of Glastonburg*, 561 F.2d 1048 (2d Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 1034 (1978). *See*, Comment, *City of Hartford* v. *Town of Glastonbury*: *Stand-*

ing to Challenge Federal Agency Actions, 52 St. John's L. Rev. 225 (1978).

Briefly, the plaintiffs in *City of Hartford* sued several suburban communities and HUD to enjoin them from receiving or expending grants-in-aid approved by HUD on the ground that the defendants' HAPs contained either no estimate or an entirely inaccurate estimate of the number of low income people "expected to reside" within the defendants' respective communities in apparent violation of 42 U.S.C. §5304(a)(4)(A). The defendants questioned the plaintiffs' standing to challenge the failure to include an accurate "expected to reside" in their HAPs because plaintiffs were unable to show that they were either injured by such failure or would be helped if the HAPs were amended. Before making its ruling, Judge Meskill, writing for a plurality of the court in an *en banc* decision, made the following observation:

> It is our task to determine whether they have standing to make such a challenge. The applicable standards are clear:
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> > "The essence of the standing question, in its constitutional dimension, 'is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' . . . The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect . . . but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions."
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> *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260 (1977) (citations omitted). Furthermore, the plaintiff's injury must be one which is "likely to be redressed by a favorable decision." *Simon* v.

> *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). In otherwords, a plaintiff must show injury; he must trace it to the defendant's allegedly unlawful acts; and he must show that the remedy he seeks is likely to redress his injury.

Id. at 1050. Judge Meskill, in holding that the plaintiffs lacked standing, ruled that forcing the defendants to adjust their "expected to reside" calculations would not benefit the plaintiffs because all the subsidies had been exhausted and there were no funds then available for redistribution.

> Here, it is probable that the lack of compliance with the Act did not affect plaintiffs at all. The defendant Town's housing assistance plans *have fully utilized all of the funds available for low-income housing subsidies under Title II of the Act.* Because the only effect of the expected to reside figure is indirect—via [housing assistance] subsidies—and because *no additional [housing assistance]* subsidies are *available, it is unlikely that the lack of expected to reside figures had any effect on the interests of the plaintiffs.*

Id. at 1051 (emphasis supplied). In finally dismissing the complaint Judge Meskill concluded that

> It is speculative whether the relief sought by the plaintiffs . . . will redress their alleged injury.
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> * * *
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> Thus, we conclude that the plaintiffs have failed to trace their alleged injury to the allegedly unlawful conduct of the defendants, and they [plaintiffs] have failed to demonstrates that the relief they seek would serve to redress that injury.

Id. at 1051-52.

In the present action, this court must apply a similer rationale.

In their case against HUD, plaintiffs maintain as noted that HUD's approval of the 1979-82 Town of Huntington HAP which contains "zero" goals for newly constructed or rehabilitated HUD assisted rental housing, was a violation of the Housing & Community Development Act of 1974, 42 U.S.C. §5301, *et seq.* However, whether the 1979-82 Huntington HAP was improperly approved by HUD is irrelevant at this point; what is relevant is that, even if HUD forced the Town of Huntington to amend its HAP to include new "goals" consistent with the plaintiffs' wishes, it would still not change the current status quo and enable plaintiffs to obtain their ultimate remedy—the construction of Matinecock Court—because there are no funds now available for Fiscal Year 1981 to subsidize such housing.

Nonetheless, plaintiffs argue that the Supreme Court's holding in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) compels a contrary conclusion. In *Arlington Heights*, the plaintiffs, Metropolitan Housing Development Corp. ("MHDC"), was a developer who was challenging the zoning of the Village of Arlington Heights. In ruling that MHDC had standing, the *Arlington Heights* court noted even though "MHDC would still have to secure financing," *id.* at 261, and would still have to "qualify for federal subsidies," *id.*, this would not preclude MHDC from litigating the claim for lack of standing. It is clear from the decision, however, that there was a strong likelihood that subsidies would be available in the near future for housing-assistance programs. *Id.* at 261 n. 7. Here, as in the *City of Hartford* v. *Town of Glastonbury, supra,* the situation is quite dissimilar; there are no Section 8 new construction or substantial rehabilitation funds now available and it is unlikely that any such subsidies will be available in the near future. Accordingly, it is quite clear that the relief sought against HUD—forcing HUD to amend its HAP to reflect accurately the housing need of the Huntington community—would hardly alleviate any injury possibly suffered by plaintiffs.

Moreover, while a reading of the cases discussed below and cited by plaintiffs support a standing argument generally, they do not support the argument that an absence of funds would not preclude a review of HUD's action on standing grounds. In *Kennedy Park Homes* v. *City of Lackawanna*, 436 F.2d 108, 112 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), standing was upheld since the Mayor of Lackawanna refused to sign a necessary sewerage permit, which was preventing plaintiffs from proceeding with their low-income housing proposal for which federal funds were available. Likewise, in *Dailey* v. *City of Lawton*, 425 F.2d 1037, 1038 (10th Cir. 1970), the City refused to issue a building permit for the low-income project, and the plaintiffs therefore had standing to challenge this action. But unlike the situation at bar, funds were available to HUD for distribution. Also in *United Farm Workers* v. *Delray Beach*, 493 F.2d 799, 801, 808 (5th Cir. 1974), federal funds to subsidize the proposed project were available, but the City refused to permit the project to tie into the City's water and sewerage systems. Finally, in *Park View Heights Corp.* v. *City of Blackjack*, 467 F.2d 1208, 1211, 1215 (8th Cir. 1972), not only were federal funds available, but they were initially reserved for the proposed project. The impediment to plaintiffs therein was that a zoning ordinance subsequently passed effectively prevented construction of the multi-family housing project.

It is apparent that one of these cases, which uphold the standing of parties in cases dealing with the funding of low income housing proposals, involves a situation such as this where federal subsidy funds are simply not available and are not presently forthcoming. Alternatively, *City of Hartford* v. *Town of Glastonbury, supra*, is controlling and that case mandates a dismissal. If sufficient funding does become available, plaintiffs are invited to reinstitute this action against HUD. At this time however, plaintiffs have no standing to pursue their claim against HUD. Accordingly, the claims against HUD are dismissed.

B. Plaintiffs Standing to Challenge the Town of Huntington's Zoning Laws and the HAP Submitted By the Town of Huntington

As with the causes of action against HUD, the thrust of plaintiff's primary claim against the Town of Huntington is that Huntington's inaccurate and illegal HAP caused the Matinecock Court proposal to be disapproved by HUD because the proposal was inconsistent with that HAP. In addition, plaintiffs allege that Huntington's zoning laws discriminate against minorities and are illegal under both state and federal law.

The remedy that plaintiffs seek includes ordering the Town of Huntington to amend its HAP to accurately reflect the housing needs of the community, as well as ordering the Town to amend its zoning laws to remove the zoning bar to the construction of Matinecock Court. The ultimate relief, however, is to enable Matinecock Court to be built. Thus, the court must determine "[w]hether termination of all available assistance programs would preclude standing. . . ." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* 429 U.S. at 261 n. 7. The court concludes that such unavailability of funds does prohibit the litigation of these claims for lack of standing.

The court bases this decision on the philosophy enunciated by the Second Circuit in the *City of Hartford* v. *Town of Glastonbury, supra.* While *City of Hartford* is distinguishable in that plaintiffs claims against the Town of Huntington are not against a federal agency, the reasoning which led to the Second Circuit's decision is equally applicable. As with the case against HUD, if the court ordered the Town of Huntington to submit an amended HAP and to amend its zoning laws, the Matinecock Court proposal would still not be built because of the current lack of section 8 funds. The essence of deciding a case is to afford the litigants a remedy, and the court does not and cannot decide issues

in a vacuum. In the instant case, it is clear that the court cannot offer the plaintiff the ultimate remedy they seek. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra; Warth* v. *Seldin, supra.* Accordingly, the court must dismiss the claims against the Town of Huntington.

The complaint is dismissed in all respects. So Ordered.

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U. S. D. J.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of September, one thousand nine hundred and eighty-two.

Present: HON. IRVING R. KAUFMAN,
Circuit Judges

HON. RALPH K. WINTER,
HON. ROBERT J. WARD,
District Judge.

No. 82-6030

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, ELLA OWENS, CARRIE HOWARD, THELMA LATTA, PERREPPER CRUTCHFIELD, KENNETH L. COFIELD,

Plaintiffs-Appellants,

—v.—

THE TOWN OF HUNTINGTON, NEW YORK, UNITED STATES DEPT. OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, KENNETH C. BUTTERFIELD, CLAIRE KROFT, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE,

Defendants,

THE TOWN OF HUNTINGTON, NEW YORK, SAMUEL PIERCE, KENNETH C. BUTTERFIELD, CLAIRE KROFT, ET AL.,

Defendants-Appellees.

Judgment of the Court of Appeals

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings consistent with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO, Clerk
by EDWARD J. GUARDARO
Deputy Clerk

A TRUE COPY
A. DANIEL FUSARO, Clerk
By FRANCIS X. GINDHART
Chief Deputy Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twelfth day of November, one thousand nine hundred and eighty-two.

No. 82-6030

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, ELLA OWENS, CARRIE HOWARD, THELMA LATTA, PERREPPER CRUTCHFIELD, KENNETH L. COFIELD,

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THE TOWN OF HUNTINGTON, NEW YORK, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, KENNETH C. BUTTERFIELD, CLAIRE KROFT, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE,

Defendants,

THE TOWN OF HUNTINGTON, NEW YORK, SAMUEL PIERCE, KENNETH C. BUTTERFIELD, CLAIRE KROFT, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, The Town Huntington, New York,

Order Denying Petition for Rehearing

Samuel Pierce, Kenneth C. Butterfield, Claire Kroft, Kenneth Deegan, Edward Thompson, Joseph Clemente,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, Clerk

by: FRANCIS X. GINDHART
Chief Deputy Clerk

Constitutional, Statutory, and Local Ordinance Provisions

U.S. Const. Art. III, §2.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

U.S. Const. Amend. XIV, §1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1981 (1976)

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. §1983 (1976)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Constitutional, Statutory, and Local Ordinance Provisions

42 U.S.C. §1436b (Supp. IV 1980)

§ 1436b. Financial assistance in impacted areas

The Secretary of Housing and Urban Development shall not exclude from consideration for financial assistance under federally assisted housing programs proposals for housing projects solely because the site proposed is located within an impacted area. For the purposes of this section, the term "federally assisted housing programs" means any program authorized by the United States Housing Act of 1937, sections 1715z and 1715z-1 of Title 12, section 101 of the Housing and Urban Development Act of 1965, or section 1701q of Title 12.

42 U.S.C. §1437d (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub. L. No. 97-35.

§ 1437f. Lower-income housing assistance

(a) For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this section.

Authorization for contracts for assistance payments; existing dwellings; substantially rehabilitated housing; new construction; modest design; rent increases; number of available units

Authorization for contracts for assistance payments

(b)(1) The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been

organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section; the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

(2) To the extent of annual contributions authorizations under section 1437c(c) of this title, the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. To increase housing opportunities for very low-income families, the Secretary shall assure that newly constructed housing to be assisted under this section is modest in design. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to such owners or prospective owners. Each contract to make assistance payments for newly constructed or substantially rehabilitated housing assisted under this section entered into after Aug. 13, 1981 shall provide that during the term of the contract the owner shall make available for occupancy by families which are eligible for assistance under this section, at the time of their initial occupancy, the number of units for which assistance is committed under the contract.

Contents and purposes of contracts for assistance payments; amount and scope of monthly assistance payments

(c)(1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum

monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a local housing assistance plan as defined in section 1439(a)(5) of this title. In the case of newly constructed and substantially rehabilitated units, the exception in the proceeding sentence shall not apply to more than 20 per centum of the total amount of authority to enter into annual contributions contracts for such units which is allocated to an area and obligated with respect to any fiscal year beginning on or after October 1, 1980. Proposed fair market rentals for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the Federal Register. Notwithstanding any other provision of this section, after October 12, 1977, the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative.

(2)(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary ex-

penses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).

(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

(D) Notwithstanding the foregoing, the Secretary shall limit increases in contract rents for newly constructed or substantially rehabilitated projects assisted under this section to the amount of operating cost increases incurred with respect to comparable rental dwelling units of various sizes and types in the same market area which are suitable for occupancy by families assisted under this section. Where no comparable dwelling units exist in the same market area, the Secretary shall have authority to approve such increases in accordance with the best available data regarding operating cost increases in rental dwelling units.

(3) The amount of the monthly assistance payment with respect to any dwelling unit shall be the difference between the maximum monthly rent which the contract provides that the owner is to receive for the unit and the rent the family is required to pay under section 1437a(a) of this title. Reviews of family income shall be made no less frequently than annually.

(4) The assistance contract shall provide that assistance payments may be made only with respect to a dwelling unit under lease for occupancy by a family determined to be a lower income family at the time it initially occupied such dwelling unit, except that such payments may be made with respect to unoccupied units for a period not exceeding sixty days (A) in the event that a family vacates a dwelling unit before the expiration date of the

lease for occupancy or (B) where a good faith effort is being made to fill an unoccupied unit, and, subject to the provisions of the following sentence, such payments may be made, in the case of a newly constructed or substantially rehabilitated project, after such sixty-day period in an amount equal to the debt service attributable to such an unoccupied dwelling unit for a period not to exceed one year, if a good faith effort is being made to fill the unit and the unit provides decent, safe, and sanitary housing. No such payment may be made after such sixty-day period if the Secretary determines that the dwelling unit is in a project which provides the owner with revenues exceeding the costs incurred by such owner with respect to such project.

(5) Assistance payments may be made with respect to up to 100 per centum of the dwelling units in any structure upon the application of the owner or prospective owner. Within the category of projects containing more than fifty units and designed for use primarily by nonelderly and nonhandicapped persons which are not subject to mortgages purchased under section 1720 of Title 12, the Secretary may give preference to applications for assistance involving not more than 20 per centum of the dwelling shall compare applications received during distinct time periods not exceeding sixty days in duration.

(6) The Secretary shall take such steps as may be necessary, including the making of contracts for assistance payments in amounts in excess of the amounts required at the time of the initial renting of dwelling units, the reservation of annual contributions authority for the purpose of amending housing assistance contracts, or the allocation of a portion of new authorizations for the purpose of amending housing assistance contracts, to assure that assistance payments are increased on a timely basis to cover increases in maximum monthly rents or decreases in family incomes.

Constitutional, Statutory, and Local Ordinance Provisions

(7) To the extent authorized in contracts entered into by the Secretary with a public housing agency, such agency may purchase any structure containing one or more dwelling units assisted under this section for the purpose of reselling the structure to the tenant or tenants occupying units aggregating in value at least 80 per centum of the structure's total value. Any such resale may be made on the terms and conditions prescribed under section 1437c(h) of this title and subject to the limitation contained in such section.

(8) Each contract under this section shall provide that the owner will notify tenants at least 90 days prior to the expiration of the contract of any rent increase which may occur as a result of the expiration of such contract.

Required provisions and duration of contracts for assistance payments

(d)(1) Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that–

(A) the selection of tenants for such unit shall be the function of the owner, subject to the provisions of the annual contributions contract between the Secretary and the agency, except that the tenant selection criteria used by the owner shall give preference to families which occupy substandard housing or are involuntarily displaced at the time they are seeking assistance under this section;

(B)(i) the lease between the tenant and the owner shall be for at least one year or the term of such contract, whichever is shorter, and shall contain other terms and conditions specified by the Secretary; and

(ii) the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of

the lease, for violation of applicable Federal, State, or local law, or for other good cause;

(C) maintenance and replacement (including redecoration) shall be in accordance with the standard practice for the building concerned as established by the owner and agreed to by the agency; and

(D) the agency and the owner shall carry out such other appropriate terms and conditions as may be mutually agreed to by them.

(2) Each contract for an existing structure entered into under this section shall be for a term or not less than one month nor more than one hundred and eighty months.

(3) Notwithstanding any other provisions of law, with the approval of the Secretary the public housing agency administering a contract under this section with respect to existing housing units may exercise all management and maintenance responsibilities with respect to those units pursuant to a contract between such agency and the owner of such units.

Restrictions on contracts for assistance payments

(e)(1) The Secretary shall not contract to make assistance payments with respect to a newly constructed or substantially rehabilitated dwelling unit for a term of less than two hundred and forty months or more than three hundred and sixty months, except that such term may not exceed two hundred and forty months in the case of a project financed with assistance of a loan made by, or insured, guaranteed or intended for purchase by, the Federal Government, other than pursuant to section 1715z-9 of Title 12. Notwithstanding the preceding sentence, in the case of a project owned by, or financed by a loan or loan guarantee from, a State or local agency or the Farmers' Home Administration, the term may not exceed four hundred and eighty months.

(2) The contract between the Secretary and the owner with respect to newly constructed or substantially rehabilitated dwelling units shall provide that all ownership, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner (or any entity, including a public housing agency, approved by the Secretary, with which the owner may contract for the performance of such responsibilities), except that the tenant selection criteria shall give preference to families which occupy substandard housing or are involuntarily displaced at the time they are seeking housing assistance under this section. In approving any public housing agency to assume all the management and maintenance responsibilities of any dwelling unit under the preceding sentence, the Secretary may do so without regard to whether such agency administers the housing assistance payment contract for that unit.

(3) The construction or substantial rehabilitation of dwelling units to be assisted under this section shall be eligible for financing with mortgages insured under the National Housing Act. Assistance with respect to such dwelling units shall not be withheld or made subject to preferences by reason of the availability of mortgage insurance pursuant to section 224 of such Act or by reason of the tax-exempt status of the bonds or other obligations to be used to finance such construction or rehabilitation.

(4) Nothing in this chapter shall be deemed to prohibit an owner from pledging, or offering as security for any loan or obligation, a contract for assistance payments entered into pursuant to this section: *Provided*, That such security is in connection with a project constructed or rehabilitated pursuant to authority granted in this section, and the terms of the financing or any refinancing have been approved by the Secretary.

(5) For the purpose of upgrading and thereby preserving the

Nation's housing stock, the Secretary is authorized to make assistance payments under this section directly or through public housing agencies pursuant to contracts with owners or prospective owners who agree to upgrade housing so as to make and keep such housing decent, safe, and sanitary through upgrading which involves less than substantial rehabilitation, as such upgrading and rehabilitation are defined by the Secretary. The Secretary is authorized to prescribe such terms and conditions for contracts entered into under this section pursuant to this paragraph as the Secretary determines to be necessary and appropriate, except that such terms and conditions, to the maximum extent feasible, shall be consistent with terms and conditions otherwise applicable with respect to other dwelling units assisted under this section. Notwithstanding subsection (c)(1) of this section, the Secretary may, in carrying out the preceding sentence, establish a maximum monthly rent (for units upgraded pursuant to this paragraph) which exceeds the fair market rental by not more than 20 per centum if such units are located in an area where the Secretary finds cost levels so require, except that the Secretary may approve maximum monthly rents which exceed the fair market rentals by more than 20 but not more than 30 per centum where the Secretary determines that special circumstances warrant such higher rent or where necessary to the implementation of a local housing assistance plan. The Secretary is also authorized to make assistance available under this section pursuant to this paragraph to any unit in a housing project which, on an overall basis, reflects the need for such upgrading.

Definitions

(f) As used in this section—

(1) the term "owner" means any private person or entity, including a cooperative, or a public housing agency, having the legal right to lease or sublease newly constructed or sub-

stantially rehabilitated dwelling units as described in this section;

(2) the terms "rent" or "rental" mean, with respect to members of a cooperative, the charges under the occupancy agreements between such members and the cooperative; and

(3) the term "debt service" means the required payments for principal and interest made with respect to a mortgage secured by housing assisted under this chapter.

(4) to (6) Redesignated (1) to (3).

Regulations applicable for implementation of assistance payments

(g) Notwithstanding any other provision of this chapter, assistance payments under this section may be provided, in accordance with regulations prescribed by the Secretary, with respect to some or all of the units in any project approved pursuant to section 1701q of Title 12.

Nonapplicability of inconsistent provisions to contracts for assistance payments

(h) Sections 1437c(e) and 1437d of this title, and any other provisions of this chapter which are inconsistent with the provisions of this section shall not apply to contracts for assistance entered into under this section.

Contracts with respect to substantially rehabilitated dwelling units

(1) In entering into contracts under this section with respect to substantially rehabilitated dwelling units, the Secretary shall provide that–

(1) the maximum monthly rent permitted for the assisted units be not greater than the amount permitted under subsection (c) of this section or a lesser amount which the

Secretary determines is appropriate taking into consideration the investment of the owner in the assisted units and such other factors as the Secretary determines to be relevant;

(2) the assisted units be rehabilitated to a level which meets but does not exceed applicable codes and standards for decent, safe, and sanitary housing which are prescribed by the Secretary;

(3) all the dwelling units in the housing structure in which the assisted units are located meet applicable codes and standards prescribed by the Secretary for decent, safe, and sanitary housing;

(4) the term of any such contract does not exceed the maximum term permitted under subsection (e)(1) of this section or a shorter term which the Secretary determines is appropriate taking into consideration the amount of investment of the owner in the assisted units and such other factors as the Secretary determines to be relevant; and

(5) the assisted units meet cost-effective energy efficiency standards prescribed by the Secretary.

Assistance for manufactured homes

(j)(1) The Secretary may enter into contracts to make assistance payments under this subsection to assist lower income families by making rental assistance payments on behalf of any such family which utilizes a manufactured home as its principal place of residence. Such payments may be made with respect to the rental of the real property on which there is located a manufactured home which is owned by any such family or with respect to the rental by such family of a manufactured home and the real property on which it is located. In carrying out this subsection, the Secretary may—

(A) enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make such assistance payments to the owners of such real property, or

(B) enter into such contracts directly with the owners of such real property.

(2)(A) A contract entered into pursuant to this paragraph shall establish the maximum monthly rent (including maintenance and management charges) which the owner is entitled to receive for the space on which a manufactured home is located and with respect to which assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically (but not less than annually) with respect to the market area for the rental of real property suitable for occupancy by families assisted under this paragraph.

(B) The amount of any monthly assistance payment with respect to any family which rents real property which is assisted under this paragraph, and on which is located a manufactured home which is owned by such family shall be the difference between the rent the family is required to pay under section 1437a (a) of this title and the sum of–

(i) the monthly payment made by such family to amortize the cost of purchasing the manufactured home;

(ii) the monthly utility payments made by such family, subject to reasonable limitations prescribed by the Secretary; and

(iii) the maximum monthly rent permitted with respect to the real property which is rented by such family for the purpose of locating its manufactured home;

except that in no case may such assistance exceed the total amount of such maximum monthly rent.

(3)(A) Contracts entered into pursuant to this paragraph shall establish the maximum monthly rent permitted with respect to the manufactured home and the real property on which it is located and with respect to which assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically (but not less than annually) with respect to the market area for the rental of a manufactured home and the real property on which it is located suitable for occupancy by families assisted under this paragraph, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent.

(B) The amount of any monthly assistance payment with respect to any family which rents a manufactured home and the real property on which it is located and which is assisted under this paragraph shall be the difference between the rent the family is required to pay under section 1437a(a) of this title and the sum of—

(i) the monthly utility payments made by such family, subject to reasonable limitations prescribed by the Secretary; and

(ii) the maximum monthly rent permitted with respect to the manufactured home and the real property on which it is located.

(4) The provisions of subsection (c)(2) of this section shall apply to the adjustments of maximum monthly rents under this subsection.

(5) Each contract entered into under this subsection shall be for a term of not less than one month and not more than 180 months, except that in any case in which the manufactured home park is substantially rehabilitated or newly constructed, such term may not be less than 240 months, nor more than the maximum term for a manufactured home loan permitted under section 1703(b) of Title 12.

(6) The Secretary may carry out this subsection without regard to whether the manufactured home park is existing, substantially rehabilitated, or newly constructed.

(7) In the case of any substantially rehabilitated or newly constructed manufactured home park containing spaces with respect to which assistance is made under this subsection, the principal amount of the mortgage attributable to the rental spaces within the park may not exceed an amount established by the Secretary which is equal to or less than the limitation for manufactured home parks described in section 1713(c)(3) of Title 12, and the Secretary may increase such limitation in high cost areas in the manner described in such section.

(8) The Secretary may prescribe other terms and conditions which are necessary for the purpose of carrying out the provisions of this subsection and which are consistent with the purposes of this subsection.

Verification of income

(k) The Secretary shall establish procedures which are appropriate and necessary to assure that income data provided to public housing agencies and owners by families applying for or receiving assistance under this section is complete and accurate. In establishing such procedures, the Secretary shall randomly, regularly, and periodically select a sample of families to authorize the Secretary to obtain information on these families for the pur-

pose of income verification, or to allow those families to provide such information themselves. Such information may include, but is not limited to, data concerning unemployment compensation and Federal income taxation and data relating to benefits made available under the Social Security Act, the Food Stamp Act of 1977, or Title 38. Any such information received pursuant to this subsection shall remain confidential and shall be used only for the purpose of verifying incomes in order to determine eligibility of families for benefits (and the amount of such benefits, if any) under this section.

Limitation of cost and rent increases

(l) After selection of a proposal involving newly constructed or substantially rehabilitated units for assistance under this section, the Secretary shall limit cost and rent increases, except for adjustments in rent pursuant to section 1437f(c)(2) of this title, to those approved by the Secretary. The Secretary may approve those increases only for unforeseen factors beyond the owner's control, design changes required by the Secretary or the local government, or changes in financing approved by the Secretary.

Preference for projects on suitable State and local government tracts

(m) For the purpose of achieving the lowest cost in providing units in newly constructed projects assisted under this section, the Secretary shall give a preference in entering into contracts under this section for projects which are to be located on specific tracts of land provided by States or units of local government if the Secretary determines that the tract of land is suitable for such housing, and that affording such preference will be cost effective.

Constitutional, Statutory, and Local Ordinance Provisions

Assistance for dwellings without bathrooms and kitchens; conditions; waiver of limitations

(n) In making assistance available under subsection (e)(5) and subsection (i) of this section, the Secretary may provide assistance with respect to residential properties in which some or all of the dwelling units do not contain bathroom or kitchen facilities, if–

(1) the property is located in an area in which there is a significant demand for such units, as determined by the Secretary; and

(2) the unit of general local government in which the property is located and the local public housing agency approve of such units being utilized for such purpose.

The Secretary may waive, in appropriate cases, the limitation and preference described in the second and third sentences of section 1437a(b)(3) of this title with respect to the assistance made available under this subsection.

42 U.S.C. §1439 (1976 & Supp. IV 1980) *as amended by* Act of Aug. 13, 1981, Pub.L. No. 97-35.

§ 1439. Local housing assistance plan

(a)(1) The Secretary of Housing and Urban Development, upon receiving an application for housing assistance under the United States Housing Act of 1937, section 1715z or 1715z-1 of Title 12, section 1701s of Title 12, or section 1701q of Title 12, if the unit of general local government in which the proposed assistance is to be provided has an approved housing assistance plan, shall–

(A) not later than ten days after receipt of the application, notify the chief executive officer of such unit of general local government that such application is under consideration; and

(B) afford such unit of general local government the opportunity, during the thirty-day period beginning on the date of such notification, to object to the approval of the application on the grounds that the application is inconsistent with its housing assistance plan.

(2) If the unit of general local government objects to the application on the grounds that it is inconsistent with its housing assistance plan, the Secretary may not approve the application unless he determines that the application is consistent with such housing assistance plan. If the Secretary determines, that such application is consistent with the housing assistance plan, he shall notify the chief executive officer of the unit of general local government of his determination and the reasons therefor in writing. If the Secretary concurs with the objection of the unit of local government, he shall notify the applicant stating the reasons therefor in writing.

(3) If the Secretary does not receive an objection by the close of the period referred to in paragraph (1)(B), he may approve the application unless he finds it inconsistent with the housing assistance plan. If the Secretary determines that an application is inconsistent with a housing assistance plan, he shall notify the applicant stating the reasons therefor in writing.

(4) The Secretary shall make the determinations referred to in paragraphs (2) and (3) within thirty days after he receives an objection pursuant to paragraph (1)(B) or within thirty days after the close of the period referred to in paragraph (1)(B), whichever is earlier.

(5) As used in this section, the term "housing assistance plan" means a housing assistance plan submitted and approved under section 5304 of this title or, in the case of a unit of general local government not participating under title I of this Act, a housing plan approved by the Secretary as meeting the requirements of this section.

Housing assistance applications subject to procedures

(b) The provisions of subsection (a) of this section shall not apply to—

(1) application for assistance involving 12 or fewer units in a single project or development;

(2) applications for assistance with respect to housing in new community developments approved under title IV of the Housing and Urban Development Act of 1968 or title VII of the Housing and Urban Development Act of 1970 which the Secretary determines are necessary to meet the housing requirements under such title; or

(3) applications for assistance with respect to housing financed by loans or loan guarantees from a State or agency thereof, except that the provisions of subsection (a) of this section shall apply where the unit of general local government in which the assistance is to be provided objects in its housing assistance plan to the exemption provided by this paragraph.

Approval of housing assistance application for areas not subject to approved plan

(c) For areas in which an approved local housing assistance plan is not applicable, the Secretary shall not approve an application for housing assistance unless he determines that there is a need for such assistance, taking into consideration any applicable State housing plans, and that there is or will be available in the area public facilities and services adequate to serve the housing proposed to be assisted. The Secretary shall afford the unit of general local government in which the assistance is to be provided an opportunity, during a 30-day period following receipt of an application by him, to provide comments or information relevant to the determination required to be made by the Secretary under this subsection.

(d)(1) In allocating financial assistance (other than assistance approved in appropriation Acts for use on and after October 1, 1979, under the United States Housing Act of 1937 for the purpose of carrying out section 14 of such Act) under the provisions of law specified in subsection (a) of this section, the Secretary, so far as practicable, shall consider the relative needs of different areas and communities as reflected in data as to population, poverty, housing overcrowding, housing vacancies, amount of substandard housing, or other objectively measurable conditions, subject to such adjustments as may be necessary to assist in carrying out activities designed to meet lower income housing needs as described in approved housing assistance plans submitted by units of general local government or combination of such units assisted under section 5307(a)(2) of this title. The Secretary shall assure, to the maximum extent practicable in carrying out the national housing and community development objectives, that funds available for each housing assistance program referred to in subsection (a) of this section shall be allocated or reserved in accordance with goals described in local, State, or other housing assistance plans approved by the Secretary pursuant to section 5304 of this title, and shall be utilized to meet needs reflected in data referred to in the preceding sentence. Any amounts allocated to a State or to areas or communities within a State which are not likely to be utilized within a fiscal year shall not be reallocated for use in another State unless the Secretary determines that other areas or communities within the same State cannot utilize the amounts in accordance with the appropriate housing assistance plans within that fiscal year. The amount of assistance allocated to nonmetropolitan areas pursuant to this section in any fiscal year shall not be less than 20 nor more than 25 per centum of the total amount of such assistance.

(2) In order to facilitate the provision of, and long-range planning for, housing for persons of low- and moderate-income in new community developments approved under title IV of

the Housing and Urban Development Act of 1968 and title VII of the Housing and Urban Development Act of 1970, the Secretary shall reserve such housing assistance funds as he deems necessary for use in connection with such new community developments.

(3) The Secretary may reserve such housing assistance funds as he deems appropriate for use by a State or agency thereof.

(4) Notwithstanding any other provision of law, with respect to fiscal years beginning after September 30, 1981, the Secretary of Housing and Urban Development may not retain more than 15 per centum of the financial assistance which becomes available under programs described in subsection (a)(1) of this section during any fiscal year. Any such financial assistance which is retained shall be available for subsequent allocation to specific areas and communities, and may only be used for–

(A) unforeseeable housing needs, especially those brought on by natural disasters or special relocation requirements;

(B) support for the needs of the handicapped or for minority enterprise;

(C) providing for assisted housing as a result of the settlement of litigation;

(D) small research and demonstration projects;

(E) lower-income housing needs described in housing assistance plans, including activities carried out under area-wide housing opportunity plans; and

(F) innovative housing programs or alternative methods for meeting lower-income housing needs approved by the Secretary, including assistance for infrastructure in connection with the Indian Housing Program.

§ 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful–

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

§ 3612. Enforcement by private persons

Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to that section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which pactice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the

payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

Injunctive relief and damages; limitation; court costs; attorney fees

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

42 U.S.C. §§5304 (1976 & Supp. IV 1980), *as amended by* Act of Aug. 13, 1981, Pub.L. No. 97-35.

§ 5304. Statement of activities and review

Statement of objectives and projected use of funds by grantee prerequisite to receipt of grant; publication of proposals by grantees; notice and comment

(a)(1) Prior to the receipt in any fiscal year of a grant under section 5306(b) of this title by any metropolitan city or urban county, under section 5306(d) of this title by any State, or under section 5306(d)(2)(B) of this title by any unit of general local government, the grantee shall have prepared a final statement of community development objectives and projected use of funds and shall have provided the Secretary with the certifications required in subsection (b) of this section and, where appropriate, subsection (c) of this section. In the case of metropolitan cities and urban counties receiving grants pursuant to section 5306(b) of this title and in the case of units of general local government receiving grants pursuant to section 5306(d)(2)(B) of this title, the statement of projected use of funds shall consist of proposed

community development activities. In the case of States receiving grants pursuant to section 5306(d) of this title, the statement of projected use of funds shall consist of the method by which the States will distribute funds to units of general local government.

(2) In order to permit public examination and appraisal of such statement, to enhance the public accountability of grantees, and to facilitate coordination of activities with different levels of government, the grantee shall–

(A) furnish citizens information concerning the amount of funds available for proposed community development and housing activities and the range of activities that may be undertaken;

(B) publish a proposed statement in such manner to afford affected citizens or, as appropriate, units of general local government an opportunity to examine its content and to submit comments on the proposed statement and on the community development performance of the grantee; and

(C) hold one or more public hearings to obtain the views of citizens on community development and housing needs.

In preparing the final statement, the grantee shall consider any such comments and views and may, if deemed appropriate by the grantee, modify the proposed statement. The final statement shall be made available to the public, and a copy shall be furnished to the Secretary together with the certifications required under subsection (b) of this section and, where appropriate, subsection (c) of this section.

Certification of enumerated criteria by grantee to Secretary

(b) Any grant under section 5306 of this title shall be made only if the grantee certifies to the satisfaction of the Secretary that–

(1) the grantee is in full compliance with the requirements of subsection (a)(2)(A), (B), and (C) of this section and has made the final statement available to the public;

(2) the grant will be conducted and administered in conformity with Public Law 88-352 and Public Law 90-284;

(3) the projected use of funds has been developed so as to give maximum feasible priority to activities which will benefit low- and moderate-income families or aid in the prevention or elimination of slums or blight; the projected use of funds may also include activities which the grantee certifies are designed to meet other community development needs having a particular urgency because existing conditions pose a serious and immediate threat to the health or welfare of the community where other financial resources are not available to meet such needs; and

(4) the grantee will comply with the other provisions of this chapter and with other applicable laws.

Special certifications required for certain grants

(c)(1) Any grant made under section 5306(b) of this title shall be made only if the unit of general local government certifies that it is following a current housing assistance plan which has been approved by the Secretary and which—

(A) accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower income persons (including elderly and handicapped persons, large families, owners of homes requiring rehabilitation assistance, and persons displaced or to be displaced) residing in or expected to reside in the community as a result of existing or projected changes in employment opportunities and population in the community (and those elderly persons residing in or expected to reside in the com-

munity), or as estimated in a community accepted State or regional housing opportunity plan approved by the Secretary, and identifies housing stock which is in a deteriorated condition, including the impact of conversion of rental housing to condominium or cooperative ownership on such needs;

(B) specifies a realistic annual goal for the number of dwelling units or lower income persons to be assisted, including (i) the relative proportion of new, rehabilitated, and existing dwelling units, including existing rental and owner occupied dwelling units to be upgraded and thereby preserved, (ii) the sizes and types of housing projects and assistance best suited to the needs of lower income persons in the community, and (iii) in the case of subsidized rehabilitation, adequate provisions to assure that a preponderance of persons assisted should be of low and moderate income; and

(C) indicates the general locations of proposed housing for lower income persons, with the objective of (i) furthering the revitalization of the community, including the restoration and rahabilitation of stable neighborhoods to the maximum extent possible, and the reclamation of the housing stock where feasible through the use of a broad range of techniques for housing restoration by local government, the private sector, or community organization, including provision of a reasonable opportunity for tenants displaced as a result of such activities to relocate in their immediate neighborhood, (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons, and (ii) assuring the availability of public facilities and services adequate to serve proposed housing projects.

(2) The Secretary shall establish such dates and manner for

the submission of housing assistance plans described in paragraph (1) as the Secretary may prescribe.

Submission of annual performance report by grantee to Secretary; contents; annual review and audit by Secretary of program implementation; adjustments in amount of annual grants

(d) Each grantee shall submit to the Secretary a performance report concerning the activities carried out pursuant to this chapter, together with an assessment by the grantee of the relationship of those activities to the objectives of this chapter and the needs and objectives identified in the grantee's statement submitted pursuant to subsection (a) of this section. The performance report shall be submitted annually prior to the beginning of each fiscal year, except that a grantee which receives a grant made pursuant to subsection (c) or (e) of section 5306 of this title which the Secretary determines does not fund a comprehensive community development program may submit a report with respect to such grant less frequently than annually as determined by the Secretary. The performance report shall include any citizen comments submitted pursuant to subsection (a)(6)(D) of this section and the Secretary shall consider such comments, together with the views of other citizens and such other information as may be available, in carrying out the provisions of this subsection. The Secretary shall, at least on an annual basis (or less frequently as the Secretary determines appropriate in the case of a grant for which a report is submitted less frequently than annually in accordance with the second sentence of this paragraph), make such reviews and audits as may be necessary or appropriate to determine whether the grantee has carried out a program substantially as described in its application, whether that program conformed to the requirements of this chapter and other applicable laws, and whether the applicant has a continuing capacity to carry out in a timely manner the approved Community Development Program. The Secretary may make appropriate ad-

justments in the amount of the annual grants in accordance with his findings pursuant to this subsection. With respect to grants made pursuant to sections 5306(c) and 5306(e) of this title, the Secretary may adjust, reduce, or withdraw grant funds, or take other action as appropriate in accordance with such reviews and audits, except that funds already expended on eligible activities under this chapter shall not be recaptured or deducted from future grants made to the recipient.

Audit of grantees by General Accounting Office; access to books, accounts, records, etc., by representatives of General Accounting Office

(e) Insofar as they relate to funds provided under this chapter, the financial transactions of recipients of such funds may be audited by the General Accounting Office under such rules and regulations as may be prescribed by the Comptroller General of the United States. The representatives of the General Accounting Office shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by such recipients pertaining to such financial transactions and necessary to facilitate the audit.

Environmental protection measures applicable for release of funds to recipients of assistance for projects; issuance of regulations by Secretary subsequent to consultation with Council on Environmental Quality; request and certification to Secretary for approval of release of funds; form, contents and effect of certification

(f)(1) In order to assure that the policies of the National Environmental Policy Act of 1969 and other provisions of law which further the purposes of such Act (as specified in regulations issued by the Secretary) are more effectively implemented in connection with the expenditure of funds under this chapter, and to assure to the public undiminished protection of the en-

vironment, the Secretary, in lieu of the environmental protection procedures otherwise applicable, may under regulations provide for the release of funds for particular projects to recipients of assistance under this chapter who assume all of the responsibilities for environmental review, decisionmaking, and action pursuant to such Act, and such other provisions of law as the regulations of the Secretary specify, that would apply to the Secretary were he to undertake such projects as Federal projects. The Secretary shall issue regulations to carry out this subsection only after consultation with the Council on Environmental Quality.

(2) The Secretary shall approve the release of funds for projects subject to the procedures authorized by this subsection only if, at least fifteen days prior to such approval and prior to any commitment of funds to such projects other than for purposes authorized by section 5305(a)(12) of this title or for environmental studies, the recipient of assistance under this chapter has submitted to the Secretary a request for such release accompanied by a certification which meets the requirements of paragraph (3). The Secretary's approval of any such certification shall be deemed to satisfy his responsibilities under the National Environmental Policy Act of 1969 and such other provisions of law as the regulations of the Secretary specify insofar as those responsibilities relate to the releases of funds for projects to be carried out pursuant thereto which are covered by such certification.

(3) A certification under the procedures authorized by this subsection shall—

(A) be in a form acceptable to the Secretary,

(B) be executed by the chief executive officer or other officer of the recipient of assistance under this chapter qualified under regulations of the Secretary,

(C) specify that the recipient of assistance under this

chapter has fully carried out its responsibilities as described under paragraph (1) of this subsection, and

(D) specify that the certifying officer (i) consents to assume the status of a responsible Federal official under the National Environmental Policy Act of 1969 and each provision of law specified in regulations issued by the Secretary insofar as the provisions of such Act or other such provision of law apply pursuant to paragraph (1) of this subsection, and (ii) is authorized and consents on behalf of the recipient of assistance under this chapter and himself to accept the jurisdiction of the Federal courts for the purpose of enforcement of his responsibilities as such an official.

(4) In the case of grants made to States pursuant to section 5306(d) of this title, the State shall perform those actions of the Secretary described in paragraph (2) and the performance of such actions shall be deemed to satisfy the Secretary's responsibilities referred to in the second sentence of such paragraph.

Payments; revolving loan fund; establishment in private financial institution for rehabilitation activities; standards for payments; criteria;

(g)(1) Units of general local government receiving assistance under this chapter may receive funds, in one payment, in an amount not to exceed the total amount designated in the grant (or, in the case of a unit of general local government receiving a distribution from a State pursuant to section 5306(d) of this title, not to exceed the total amount of such distribution) for use in establishing a revolving loan fund which is to be established in a private financial institution and which is to be used to finance rehabilitation activities assisted under this chapter. Rehabilitation activities authorized under this section shall begin within 45 days after receipt of such payment.

(2) The Secretary shall establish standards for such cash payments which will insure that the deposits result in appropriate benefits in support of the recipient's rehabilitation program. These standards shall be designed to assure that the benefits to be derived from the local program include, at a minimum, one or more of the following elements, or such other criteria as determined by the Secretary–

(A) leverage of community development block grant funds so that participating financial institutions commit private funds for loans in the rehabilitation program in amount substantially in excess of deposit of community development funds;

(B) commitment of private funds for rehabilitation loans at below-market interest rates or with repayment periods lengthened or at higher risk than would normally be taken;

(C) provision of administrative services in support of the rehabilitation program by the participating lending institutions; and manner which supports the community rehabilitation program.

Metropolitan city as part of urban county

(h) In any case in which a metropolitan city is located, in whole or in part, within an urban county, the Secretary may, upon the joint request of such city and county, approve the inclusion of the metropolitan city as part of the urban county for purposes of submitting a statement under subsection (a) of this section and carrying out activities under this chapter.

N.Y. Town Law §261 (McKinney 1965)

§ 261. Grant of power; appropriations for certain expenses incurred under this article

For the purpose of promoting the health, safety, morals, or

the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city; provided further, that all charges and expenses incurred under this article for zoning and planning shall be a charge upon the taxable property of that part of the town outside of any incorporated village or city. The town board is hereby authorized and empowered to make such appropriation as it may see fit for such charges and expenses, provided however, that such appropriation shall be the estimated charges and expenses less fees, if any, collected, and provided, that the amount so appropriated shall be assessed, levied and collected from the property outside of any incorporated village or city. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained.

N.Y. Town Law §263 (McKinney Supp. 1982-1983)

§ 263. Purposes in view

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to make provision for, so far as conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefor; to facilitate the adequate provision of transportation, water, sewerage,

schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

N.Y. Town Law §264 (McKinney 1965 & Supp. 1982-1983)

§ 264. Method of proceedure

The town board shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restrictions or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least ten days' notice of the time and place of such hearing shall be published in a paper of general circulation in such town and a written notice of any proposed change or amendment affecting property within the protectively zoned area of a housing project authorized under the public housing law, as such area is shown on an approved zoning map filed with the town officer charged with enforcement of zoning regulations, or property within five hundred feet of the boundaries of any city, village, town, county, state park or parkways shall be given, in the case of a housing project to the housing authority erecting or owning the project and to the government providing financial aid or assistance thereto, in the case of any state park or parkway, to the regional state park commission having jurisdiction over such state park or parkway, in the case of a city, village or town to the clerk of such city, village or town, and in the case of a county, to the clerk of the board of supervisors or other person performing like duties, at least ten days prior to the date of such public hearing. Such city, village, town or county shall have the right to appear and

to be heard at such public hearing with respect to any such proposed change or amendment, but shall not have the right of review by a court as hereinafter provided.

Every zoning ordinance and every amendment to a zoning ordinance (excluding any map incorporated therein) adopted pursuant to the provisions of this chapter shall be entered in the minutes of the town board; such minutes shall describe and refer to any map adopted in connection with such zoning ordinance or amendment and a copy thereof (exclusive of any map incorporated therein) shall be published once in a newspaper published in the town, if any, or in such newspaper published in the county in which such town may be located having a circulation in such town, as the town board may designate, and affidavits of the publication thereof shall be filed with the town clerk. Such ordinance shall take effect ten days after such publication, but such ordinance or amendment shall take effect from the date of its service as against a person personally with a copy thereof, certified by the town clerk under the corporate seal of the town; and showing the date of its passage and entry in the minutes. Every town clerk shall maintain a separate file or filing cabinet for each and every map adopted in connection with a zoning ordinance or amendment and shall file therein every such map hereafter adopted; said file or filing cabinet to be available at any time during regular business hours for public inspection.

N.Y. Town Law §265 (McKinney Supp. 1982-1983)

§ 265. Changes

Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed by ordinance. In case, however, of a protest against such change signed by the owners of twenty per centum or more, either of the area of the land included in such proposed change, or of that immediately adjacent extending one hundred feet therefrom

or of that directly opposite thereto, extending one hundred feet, from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of at least three-fourths of the members of the town board. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

Changes, amendments or supplements made to any zoning ordinance (excluding any map incorporated therein) adopted pursuant to the provisions of this chapter shall be entered in the minutes of the town board; such minutes shall describe and refer to any map adopted in connection with such change, amendment or supplement and a copy thereof (exclusive of any map incorporated therein) shall be published once in a newspaper published in the town, if any, or in such newspaper published in the county in which such town may be located having a circulation in such town, as the town board may designate, and affidavits of the publication thereof shall be filed with the town clerk. Such ordinance shall take effect ten days after such publication, but such ordinance shall take effect from the date of its service as against a person served personally with a copy thereof, certified by the town clerk under the corporate seal of the town; and showing the date of its passage and entry in the minutes. Every town clerk shall maintain a separate file or filing cabinet for each and every map adopted in connection with any change, amendment or supplement made to any zoning ordinance and shall file therein every such map hereafter adopted; said file or filing cabinet to be available at any time during regular business hours for public inspection.

N.Y. Town Law §267 (McKinney 1965 & Supp. 1982-1983)

§ 267. Board of appeals

1. Such town board shall appoint a board of appeals consisting of five members, shall designate its chairman and may also

provide for compensation to be paid to said members, experts, clerks and a secretary and provide for such other expenses as may be necessary and proper, not exceeding in all the appropriations that may be made by the town board for such board of appeals. No person who is a member of the town board shall be eligible for membership on such board of appeals. Of the members of the board first appointed, one shall hold office for the term of one year, one for the term of two years, one for the term of three years, one for the term of four years, one for the term of five years from and after his appointment; provided, however, that such town board may, by resolution, increase the number of members of the board to seven, and provide for their compensation and thereafter such additional members shall be first appointed for terms of two and four years respectively. A town board that has increased the number of members of the board to seven may, by resolution, decrease the number of members of the board to five to take effect upon the next two expiration of terms. Their successors, including such additional members as may be appointed by the town board, shall be appointed for the term of five years from and after the expiration of the terms of their predecessors in office. If a vacancy shall occur otherwise than by expiration of term, it shall be filled by the town board by appointment for the unexpired term. The town board shall have the power to remove any member of the board for cause and after public hearing. All meetings of the board of appeals shall be held at the call of the chairman and at such other times as such board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of such board shall be open to the public. Such board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official actions. Every rule, regulation, every amendment or repeal thereof, and every order, requirement, decision or determination of the board shall immedi-

ately be filed in the office of the town clerk and shall be a public record.

2. Such board of appeals shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article. It shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. The concurring vote of a majority of the members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant any matter upon which it is required to pass under any such ordinance or to effect any variation in such ordinance. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the town.

3. Such appeal shall be taken within such time as shall be prescribed by the board of appeals by general rule, by filing with the officer from whom the appeal is taken and with the board of appeals a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

4. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals, after the notice of appeal shall have been filed with him, that by reason of facts stated in the certificate a stay, would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown.

5. The board of appeals shall fix a reasonable time for the

hearing of the appeal or other matter referred to it and give public notice thereof by the publication in the official paper of a notice of such hearing, at least five days prior to the date thereof, and shall, at least five days before such hearing, mail notices thereof to the parties and to the regional state park commission having jurisdiction over any state park or parkway within five hundred feet of the property affected by such appeal, and shall decide the same within sixty days after the final hearing. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and shall make such order, requirement, decision or determination as in its opinion ought to be made in the premises and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinances, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.

6. Upon motion initiated by any member and adopted by the unanimous vote of the members present, but not less than a majority of all the members, the board of appeals shall review at a rehearing held upon notice given as upon an original hearing, any order, decision or determination of the board not previously reviewed. Upon such rehearing, and provided it shall then appear that the rights vested prior thereto in persons acting in good faith in reliance upon the order, decision or determination reviewed will not be prejudiced thereby, the board may, upon the concurring vote of all of the members then present, reverse, modify or annul its original order, decision or determination.

7. Any person or persons, jointly or severally aggrieved by any decision of the board of appeals or any officer, department, board or bureau of the town, may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceeding shall be instituted within thirty days after the filing of a decision in the office of the town clerk. The court may take evidence or appoint a referee to take such evidence as it may direct and report the same with his findings of fact and conclusions of law, if it shall appear that testimony is necessary for the proper disposition of the matter. The court at special term shall itself dispose of the cause on the merits, determining all questions which may be presented for determination.

8. Costs shall not be allowed against the board of appeals unless it shall appear to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from.

9. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.

10. If upon the hearing at a special term of the supreme court, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

N.Y. Town Law §272-a (McKinney 1965)

§ 272-a. Master plan

The planning board may prepare and change, a comprehensive master plan for the development of the entire area of the

town, which master plan shall show desirable streets, bridges and tunnels and the approaches thereto, viaducts, parks, public reservations, roadways in parks, sites for public buildings and structures, zoning districts, pierhead and bulkhead lines, waterways and routes of public utilities and such other features existing and proposed as will provide for the improvement of the town and its future growth, protection, and development, and will afford adequate facilities for the public housing, transportation, distribution, comfort, convenience, public health, safety and general welfare of its population.

Such planning board may advertise and hold public hearings when it desires, which hearings shall be advertised in a newspaper of general circulation in said town at least ten days before each such hearing.

The master plan and all modifications thereof shall be on file in the office of the planning board, and the planning board shall file certified copies in the offices of the town engineer or town highway superintendent and the town clerk.

Code of the Town of Huntington §§198-126 through 198-130 (1978)

ARTICLE SIX

Amendments

§ 198-126. Authority to amend chapter or map.

The Town Board may from time to time amend, supplement, modify, repeal or change this chapter or the Zoning Map on its own motion or on petition, application or on recommendation of the Planning Board.

§ 198-127. Referral to Planning Board.

The Town Board may refer a proposed amendment to the Planning Board for recommendation and written report thereon.

The Town Board may specify a reasonable time within which such report shall be submitted, and no public hearing shall be held upon any amendment until such report has been received or until the specified time has elapsed without such report having been received.

§ 198-128. Applications for amendments; hearing.

Application to amend this chapter may be made by any property owner. The Town Board may schedule a public hearing to consider such application.

§ 198-129. Hearing notice requirements.

A. By resolution adopted at a regular meeting of the Board the Town Board shall fix the time and place of any public hearing upon an amendment to this chapter and shall give at least ten (10) days' notice thereof by publishing a notice in the official town newspaper as required by law and by posting a printed copy of such notice on the sign-board maintained by the Town Clerk pursuant to §30, Subdivision 6, of the Town Law.

B. Notice of hearing shall state the location of the building on premises, the name of the owner and applicant and the general nature of the application.

C. In addition to the foregoing requirements, notice of any public hearing called pursuant to §198-128 of this chapter to consider an amendment to the Zoning Map shall be given by mailing or serving a notice thereof to the owners of the subject property and of all adjoining property within two hundred (200) feet of the exterior limits of the applicant's total property holding, as shown on the latest assessment roll. The applicant shall be required to make such notification, and proof of service shall be submitted to the Board at the time of hearing. Such

notice shall be given not less than thirty (30) days prior to the date of hearing. The Town Board shall not call a public hearing upon any proposed zoning amendment until the applicant, excluding the Town Board or Planning Board, has paid the required filing fee to the Town Clerk and complied with the requirements of this section and with applicable disclosure requirements. [Amended 5-4-76 by Ord. No. 76-ZC-62]

D. In addition to notifying adjoining property owners by mail the applicant or his agent shall erect a sign on each frontage of the property announcing the date, time and place of the public hearing. Said sign shall be twenty by thirty (20 x 30) inches in dimension and will be supplied by the town. The sign shall be placed at the center of the frontage and shall not be more than ten (10) feet from the street line. It shall not be less than two (2) feet nor more than six (6) feet above grade. The sign shall be erected on the property not more than ten (10) days nor less than five (5) days prior to the public hearing, and an affidavit of posting shall be submitted at the time of the hearing. The applicant shall be responsible for the removal of the sign within three (3) days after the hearing. [Added 6-3-75 by Ord. No. 75-ZC-54]

§ 198-130. Application requirements for Zoning Map amendments.

Any applicant or petitioner who requests an amendment to the Zoning Map shall submit to the Town Clerk with the application for such amendment on original drawing and three (3) copies thereof of a survey of the property for which an amendment is requested, prepared by a land surveyor or engineer currently licensed by the State of New York. The original survey shall be in ink on tracing cloth on a sheet size of eight and one-half by eleven (8½ x 11) inches and shall show the property

in question and adjoining property on which the zoning is designated by standard symbols shown on the official Zoning Map. The bottom five (5) inches of the survey map shall remain blank for insertion of a written description of the proposed amendment by the Town Clerk. A written description of the proposed amendment shall accompany the survey and application.

§198-131. Procedure upon adoption.

Any amendment to these regulations shall, upon adoption, be entered in the minutes of the Town Board and shall be published and posted according to law.

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1339

IN THE

Supreme Court of the United States

October Term, 1982

THE TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE and KATHLEEN FERRARO,

Petitioners,

-v.-

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, ELLA OWENS, CARRIE HOWARD, THELMA LATTA, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD F. BELLMAN
STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013

THOMAS ATKINS
CURTIS RODGERS
MARGRETT FORD
National Association for the
Advancement of Colored People
186 Remsen Street
Brooklyn, New York 11201

Attorneys for Respondents

(13707)

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Warth v. Seldin, 422 U.S. 490 (1975) 4

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARGUMENT

The respondents, Housing Help, a low income housing sponsor, and several low income and minority citizens, brought this action challenging the Town of Huntington's refusal to provide multi-family zoning to enable construction of a housing project for low income persons. The project is to be located outside the deteriorating predominantly black area of Hunting-

ton, in an almost all white neighborhood. Housing Help had planned to subsidize this project with funds from the Department of Housing & Urban Development's (HUD) Section 8 low income housing program.

The principle claim is that denial of zoning for the project violates the Federal Fair Housing Law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, *et seq.* The district court dismissed the complaint for lack of standing. It held that the remedy sought by respondents, construction of the project, was speculative as HUD had insufficient Section 8 appropriations for fiscal year 1981 to fund any projects in the county where Huntington is located. The Second Circuit, relying on this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), reversed. The appellate court held that the lack of Section 8 funds for a particular fiscal year was insufficient reason to deny standing. The court found that "where long term financing is the issue, it is particularly unreasonable to ask plaintiffs to prove more than some reasonable prospects of future financing." 689 F.2d at 394. A petition for rehearing *en banc* was thereafter denied.

The *Arlington Heights* case presented a factual pattern virtually identical to the instant case. There, too, the municipality challenged standing as the housing sponsor did not have a HUD funding commitment. This Court, in upholding the standing of the low income plaintiff, stated that "all housing developments are subject to some extent to similar uncertainties." 429 U.S. at 261. The Second Circuit, in applying the *Arlington Heights* holding, stressed the similarities between the housing proposed in that case and the project Housing Help seeks to construct.

> The record here indicates a sufficiently similar degree of detail on the part of Housing Help. An option to purchase the 14.6 acre site upon which Matinecock Court would be built is alleged to have been secured and detailed plans as to the number and nature of the dwelling units have been drafted. Like *Arlington Heights*, "[t]he challenged action . . . stands as an absolute barrier to constructing the housing [Housing

> Help desires] to place on the [Greenhaven/East Northport] site. [Village of Arlington Heights, *supra.* at 261]. Invalidation of the challenged ordinance, therefore, would tangibly improve the chances of construction of Matinecock Court. 689 F.2d at 395.

As the *Arlington Heights* case established, fluctuations in levels of funding appropriations do not determine standing to challenge discriminatory local zoning. Indeed, the amount of Section 8 funds available in 1981 was of no real significance as Housing Help would first have had to overturn Huntington's discriminatory zoning before it could have obtained a Section 8 allocation. Fiscal 1981 funds could therefore never have been used for the Housing Help project and it would be illogical to tie the respondents' standing to the Section 8 appropriations in that year. As the Second Circuit stated, "Indeterminacy of financing alone, however, is not enough to dismiss such an action, since the multitude of factors affecting ultimate financing capability are too variable to permit certainty in prediction. . . . [D]ismissal of a complaint because of a lack of committed financing may well prevent any litigant from challenging a zoning ordinance." 689 F.2d at 394.

The petitioner argues that this Court should grant *certiorari* in order to clarify a point left open by the *Arlington Heights* decision. In a footnote this Court stated: "Whether termination of all available assistance programs would preclude standing is not a matter we need to decide in view of the current likelihood that subsidies may be secured under [Section 8]." 429 U.S. at 261, n. 7. The record in the instant case establishes that the Section 8 program has not been terminated – there has only been a decrease in Section 8 appropriations. See Joint Appendix in Second Circuit at 112a. Therefore, this case does not involve a situation where there has been a termination of all available assistance programs.

Even if there had been a termination of the Section 8 program, dismissal of the complaint would be inappropriate. This

Court has repeatedly emphasized that as a case progresses, amendments to the complaint are to be allowed to provide additional facts in support of a plaintiff's standing to sue. See *Warth v. Seldin*, 422 U.S. 490, 501-502 (1975). Thus, should the Section 8 program be terminated, Housing Help must be given an opportunity to amend the complaint to set forth alternative plans for financing its project.

Additionally, there is no merit to the petitioner's alternative argument that the Second Circuit decision somehow will enmesh the federal courts in a mountain of zoning cases. Unquestionably, Title VIII jurisdiction is present in the instant matter and is not lost simply because the claim arises in a zoning context. Indeed, in *Arlington Heights* this Court remanded for a determination of the plaintiffs' Title VIII allegations and the Seventh Circuit thereafter established Title VIII guidelines. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. den. 434 U.S. 1025 (1978). See also *Resident Advisory Bd. v. Rizzo*, 564 F.2d 125 (3d Cir. 1977), cert. den. 435 U.S. 908 (1978).

CONCLUSION

All of the issues presented by the petitioners have previously been resolved by this Court and the Second Circuit properly applied the *Arlington Heights* ruling. The petition should, therefore, be denied.

Respectfully submitted,

RICHARD F. BELLMAN
STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
THOMAS ATKINS
CURTIS RODGERS
MARGRETT FORD
National Association for the
Advancement of Colored People
186 Remsen Street
Brooklyn, New York 11201

Attorneys for Respondents